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DIE SUBSIDIARITÄTS PRINZIP IM SPANNUNGSFELD DER PRINZIPIEN DER INTEGRATION UND EFFEKTIVITÄT EINERSEITS UND DER DER DEMOKRATIE UND SOUVERÄNITÄT ANDERERSEITS

Abstrakt

Nach Einführung des Subsidiaritätsprinzips im Primärrecht der Union[1] durch Maastricht 1993 ist das Subsidiaritätsprinzip durch die Verträge von Amsterdam 1999 und Lissabon 2009 in seiner Kernaussage beibehalten. Anders sieht dies in den Protokollen zum Vertrag aus, die selbst Bestandteile des Primärrechts sind (Art. 51 EUV[2]). Erstmals 1999 ist durch den Amsterdamer Vertrag ein detaillierteres Subsidiaritätsprotokoll ergangen, das Protokoll Nr. 2 über die Anwendung der Grundsätze der Subsidiarität und der Verhältnismäßigkeit[3]. Dieses wurde durch den Reformvertrag von Lissabon wesentlich verändert und wirft trotz detaillierter Regelungen zahlreiche alte und neue Fragen auf. Hierzu tragen

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* Rechtsanwalt, Hamburg.

[1] Gleichbedeutend mit der dem Terminus der Europäischen Union/EU.

[2] Vertrag über die Europäische Union, Konsolidierte Fassung ABl 2008 C 115/47.

[3] Im Folgenden „Subsidiaritätsprotokoll".

aus Sicht des Rechtsstaatsprinzips bereits seit 1993 der prinzipienbasierte Ansatz und die unbestimmten Rechtsbegriffe bei, die ein Spiegel der divergierenden politischen Interessen und Auslegungen sind. Durch Lissabon sind zur Stärkung des Demokratiegedankens Mitsprache- und Klagerechte für die 27 Parlamente der Mitgliedstaaten und ihrer jeweiligen Parlamentskammern eingeführt worden. Die Motivationen für die Stärkung des Subsidiaritätsprinzips können sowohl auf den Demokratie- als auch Souveränitätsgedanken zurückgeführt werden, was für die fortschreitende Integration der EU vor- als auch nachteilig wirken kann. Zusätzlich ist dem Ausschuss der Regionen im Rahmen der Nichtigkeitsklage ein eigenständiges Klagerecht zugestanden worden. Mit der zunehmenden Zahl der Teilnehmer und Verfahrensrechte wird der europäische Gesetzgebungsprozess belebt, zugleich jedoch komplexer und damit insgesamt schwieriger zu handhaben.

Schlüsselwörter: *Kompetenzen, Prinzip der begrenzten Einzelermächtigung, Subsidiarität und Verhältnismäßigkeit, Subsidiaritäts-verfahren, Frühwarnsystem, Unbestimmtheit, Plausibilitätskontrolle, Negativ- und Positivtest, Zweistufenprüfung, Effektivität, Nichtigkeitsklage, Judicial-Self-Restraint.*

1. RECHTSCHARAKTER DES SUBSIDIARITÄTSPRINZIPS

Das Subsidiaritätsprinzip selbst ist in Art. 5 III EUV normiert, die Subsidiaritätsklage in Art. 263 AEUV[4] (ex Art. 230 EGV[5]) und Art. 8 Subsidiaritätsprotokoll. Auch das Subsidiaritätsprinzip ist den Werten und Zielen[6] der EU unterworfen. [7] Die Einführung des Grundsatzes durch den Vertrag von Maastricht 1993 hat zahlreiche Literaturbeiträge hervorgerufen,

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[4] Vertrag über die Arbeitsweise der Europäischen Union, Konsolidierte Fassung ABl (Amtsblatt) 2008 C 115/47 (zum Lissabon-Vertrag ABl 2007 C 306/1).

[5] Vertrag über die Europäischen Gemeinschaften.

[6] Zu den Grundlagen C. Stumpf in *EU-Kommentar* (Hg: J. Schwarze), 2009, Art. 1 und 2.

[7] Zum Subsidiaritätsgrundsatz C. Calliess, Subsidiaritäts- und Solidaritätsprinzip in der EU, 1999; W. Hilz, Subsidiaritätsprinzip und EU-Gemeinschaftsordnung, 1998; W. Moersch, Leistungsfähigkeit und Grenzen des Subsidiaritätsprinzips, 2001; C. Timmermann, Subsidiarity and Transparency, 22 *Fordham International Law Journal* 1999, p. 5106; G. Bermann, Proportionality and Subsidiarity, in: *The Law of the Single European Market: Unpacking the Premises* (Ed: C. Barnard/J. Scott), 2002; N. Bernard, The Future of European Economic Law in the light of the Principle of Subsidiarity, 33 *Common Market Law Review* (CML Rev) 1996, p. 633.

da absehbar war, dass dieses Prinzip eine Auswirkung auf sämtliche Kompetenzen und andere Grundsätze innerhalb der EU haben würde.[8] Mit dem Subsidiaritätsprinzip kann nämlich das Gleichgewicht zwischen den zentrifugalen und zentripetalen Kräften in der Union bestimmt werden.[9] Der Subsidiaritätsgrundsatz hat daher nicht an Bedeutung verloren, sondern durch die zusätzlichen Regelungen des Subsidiaritätsprotokolls gewonnen.[10] Der Prozess zum Verfassungs- und Reformvertrag hat gezeigt, dass trotz seiner Implementierung im Primärrecht 1993 kein einheitliches Verständnis besteht, sondern der Grundsatz bei jeder Reform der Verträge neu besprochen wird.[11]

Der Grundgedanke des Subsidiaritätsprinzips besagt, dass die unteren (Staats) Ebenen die Zuständigkeiten ausüben, die sie selbst wirksam wahrnehmen können, und nur wenn diese Wirksamkeit nicht gewährleistet ist, übergeordnete (Staats-) Ebenen diese Aufgaben übernehmen.[12] Zugespitzt kann das Subsidiaritätsprinzip als Vorrangrecht der zentripetalen – „nationalen" – Kräfte in der Union angesehen werden.[13] Eine entscheidende Neuerung durch Lissabon ist die Erweiterung der Beteiligten und ihrer

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[8] Bspw. A. Toth, The Principle of Subsidiarity in the Maastricht Treaty, *29 CML Rev* 1992, p. 1079; D. Z. Cass, The World that saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community, *29 CML Rev* 1992, p. 1107.

[9] Stellvertretend H.-J. Lambers, Subsidiarität in Europa – Allheilmittel oder juristische Formel?, in: *EuR (Europarecht),* 1993, S. 229ff.; H. Lecheler, *Das Subsidiaritätsprinzip, Strukturprinzip der Europäischen Union*, 1993; D. Merten (Hg.), *Die Subsidiarität Europas*, 1994; K. W. Nörr, Th. Oppermann (Hg.), *Subsidiarität: Idee und Wirklichkeit, Zur Reichweite eines Prinzips in Deutschland und Europa*, Tübingen 1997; S. U. Pieper, *Subsidiarität: Ein Beitrag zur Begrenzung der Gemeinschaftskompetenz*, 1994; B. Schima, *Das Subsidiaritätsprinzip im Europäischen Gemeinschaftsrecht*, 1994.

[10] G. Lienbacher, Art. 5 EGV Rn. 6ff., in: *EU-Kommentar* (Hg. J. Schwarze), 2009; G. Davies, Subsidiarity: the wrong idea, in the wrong place, at the wrong time, *43 CML Rev* 2006, p. 63; A. Goucha Soares, The Division of Competences in the European Constitution, *11 European Public Law 2005*, p. 603.

[11] Th. Oppermann, Eine Verfassung für die Europäische Union – Der Entwurf des Europäischen Konvents, *Deutsches Verwaltungsblatt (DVBl)* 2003, S. 1171; kritisch U. Everling, Rechtsschutz im europäischen Wirtschaftsrecht auf der Grundlage der Konventsregelungen, in: *Der Verfassungsentwurf des Europäischen Konvents* (Hg: J. Schwarze), 2004, S. 379.

[12] A. Arnull, A. Dashwood, M. Dougan, M. Ross, E. Spaventa, D. Wyatt, The principle of subsidiarity, in: *European Union Law* (Ed: D. Wyatt, A. Daswood), 2006, p. 4-013.

[13] W. Schroeder, *Grundkurs Europarecht*, 2009, § 7 Rn. (Randnummer) 19.

Rechte im europäischen Gesetzgebungsprozess. Durch die Beteiligung der nationalen Parlamente, ihrer zweiten Kammern, der lokalen sowie regionalen Vertretungen wird eine weitere demokratische Legitimation zum unmittelbar demokratisch gewählten Europäischen Parlament geschaffen. Diese Erweiterung kann kritisch betrachtet, aber auch begrüßt werden, da kulturelle, traditionelle und historische Eigenheiten sowie Gewohnheiten und damit nationale Identitäten weitere Mitsprache erhalten.[14] Die nationalen Interessen können zwar zu einer Stärkung der demokratischen Gesetzgebungsgrundlage und demokratischen Legitimation führen. Genauso besteht jedoch die Gefahr, dass der europäische Gesetzgebungsprozess verzögert oder teilweise gehemmt wird, wodurch das gesamte Unionssystem eher delegitimiert wird.

Der Subsidiaritätsgrundsatz ist bewusst Bestandteil des Art. 5 EUV, mit dem die Kompetenzen der Union erfasst werden.[15] Dadurch wird die Kompetenzstruktur der EU weiter ausgestaltet und die Komplexität im Zusammenspiel mit dem Prinzip der begrenzten Einzelermächtigung und der Verhältnismäßigkeit erhöht.[16] Diese drei Prinzipien des Art. 5 EUV können als Kompetenztrias bezeichnet werden, die selbst wiederum in einem engen Verhältnis zu anderen Strukturprinzipien der Europäischen Union stehen wie die Bürgernähe, der Effet Utile oder der Integrationsgedanke sind zu berücksichtigen.[17] Erschwert wird eine einheitliche Auslegung letztendlich durch den politischen Willen der einzelnen Mitgliedstaaten,[18] weshalb

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[14] A. Haratsch, C. Koenig, M. Pechstein, *Europarecht*, 2010, Rn. 166.

[15] H. D. Jarass, EG-Kompetenzen und das Prinzip der Subsidiarität nach Schaffung der Europäischen Union, *EuGRZ* 1994, S. 209ff.; A. von Bogdandy, J. Bast, The European's Vertical Order of Competences: The Current Law Proposals For Its Reform, *39 CML Rev* 2002, p. 227; J. Kühling, Die Zukunft der Europäischen Kompetenzordnung in der Ratifizierungskrise des Verfassungsvertrages, *Der Staat* 2006, S. 339ff.; C. Vedder, Art. I-11ff., in: *Europäischer Verfassungsvertrag* (Hg: C. Vedder, W. H. von Heinegg), 2008.

[16] De Burca, The Principal of Proportionality and its Application in EC law, *13 Yearbook of European Law (YEL)* 1993, p. 13; A. Arnull, A. Dashwood, M. Dougan, M. Ross, E. Spaventa, D. Wyatt, The principle of proportionality, in: *European Union Law* (Ed: D. Wyatt, A. Dashwood), 2006, p. 4-022ff.

[17] J. Santer, Some Reflections on the Principle of Subsidiarity, in: *Subsidiarity: the Challenge of Change* (Ed: European Institute of Public Administration), 1991, p. 19ff.

[18] W. Robinson, The Court of Justice after Maastricht, in: *Legal Issues of the Maastricht Treaty* (Ed. D. O'Keeffe, P. Twomey), 1994, p. 187-9; Brittan, Institutional development of the European Community, in: *Public Law* 1992, p. 567ff.; A. J. Mackenzie-Stuart, Assessement

insgesamt die Bestimmtheit, Rechtsverbindlichkeit und Justiziabilität des Subsidiaritätsprinzips in Frage gestellt wird.[19] Der Diskurs um das Subsidiaritätsprinzip offenbart den Kompetenzklärungsbedarf in der Europäischen Union, hinter dem sich strukturelle Grundsatzfragen nach einer föderalen, demokratischen und effizienten Union verbergen.[20]

Vereinzelt wurde das Subsidiaritätsprinzip als Kompetenzzuweisungs- und Kompetenzübertragungsschranke angesehen.[21] Die Struktur des Art. 5 EUV und inzwischen auch der Wortlaut ist mit dieser Ansicht aber nicht vereinbar. Überwiegend wird das Subsidiaritätsprinzip als Kompetenzausübungsschranke gesehen.[22] Art. 5 I EUV in der Fassung von Lissabon stellt dies grammatikalisch klar. Dort werden die Prinzipien nach "Abgrenzung" und "Ausübung" unterschieden. Weiter spricht für diese Sicht die systematisch Stellung des Subsidiaritätsprinzips. Denn das Prinzip der begrenzten Einzelermächtigung ist in Absatz 1 und 2 als vorangehendes Grundprinzip verankert. Erst nach dieser Grundsatzentscheidung folgen bezüglich der Ausübung der Kompetenzen das Subsidiaritäts- und Verhältnismäßigkeitsprinzip in den Absätzen 3 und 4.[23]

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of the view expressed and introdcution to a panel discussion, in: *Subsidiarity: the Challenge of Change* (Ed. European Institute of Public Administration), 1991, p. 38; M. Wilke, H. Wallace, *Subsidiarity: Approaches to Power-Sharing in the European Community*, 1990, 11.

[19] A. Toth, Is Subsidiarity justiciable?, *19 European Law Review (EL Rev)* 1994, p. 268.

[20] J. Isensee, *Subsidiaritätsprinzip und Verfassungsrecht,* 2001, S. 18ff.; P. Häberle, Das Prinzip der Subsidiarität aus der Sicht der vergleichenden Verfassungslehre, *Archiv des Öffentlichen Rechts (AöR)* 1994, S. 189ff.; W. Frenz, Subsidiaritätsprinzip und -klage nach dem Vertrag von Lissabon, *Jura* 2010, S. 641ff.; A. Epiney, Föderalismus in der Europäischen Union – einige Überlegungen auf der Grundlage des Verfassungsentwurfs, in: *Die neue Verfassung der Europäischen Union* (Hg: M. Zuleeg), 2006, S. 53ff.

[21] D. Merten (Hg.), *op. cit.*, S. 81.

[22] H.-J. Lambers, *op. cit.*, S. 231ff.; C. Calliess, Art. 5 Rn. 2, in: *Kommentar EU* (Hg: C. Callies, M. Ruffert), 2002; G. Lienbacher, Art. 5 Rn. 12, in: *EU-Kommentar* (Hg: J. Schwarze), 2009.

[23] A. Arnull, A. Dashwood, M. Dougan, M. Ross, E. Spaventa, D. Wyatt, Union Competences, in: *European Union Law* (Ed: D. Wyatt, A. Daswood), 2006, p. 81ff.

2. DER REFORMVERTRAG VON LISSABON

2.1. Voraussetzungen des Art. 5 EUV

2.1.1. Ausschluss ausschließlicher Kompetenzen von der Anwendung

"Nach dem Subsidiaritätsprinzip wird die Union *in den Bereichen, die nicht in ihre ausschließliche Zuständigkeit fallen*, nur tätig, sofern und soweit die Ziele der in Betracht gezogenen Maßnahmen von den Mitgliedstaaten weder auf zentraler noch auf regionaler oder lokaler Ebene ausreichend verwirklicht werden können, sondern vielmehr wegen ihres Umfangs oder ihrer Wirkungen auf Unionsebene besser zu verwirklichen sind."

Das Subsidiaritätsprinzip ist nicht auf ausschließliche Zuständigkeiten der Union anwendbar.[24] Mitgliedstaaten können keine Kompetenzen in der ausschließlichen Verantwortlichkeit der Union beanspruchen, weshalb die Anwendung auf konkurrierende und parallele Kompetenzen zu beziehen ist, welche den größeren Teil der Kompetenzen ausmachen. Deshalb erfordert die Subsidiaritätsprüfung als Prämisse stets eine indizielle Prüfung der Kompetenzzuständigkeiten.[25] Die Kompetenzprüfung selbst wird durch die historisch begründete Kompetenzkomplexität der Union wie Rechtsangleichungs- und Harmonisierungsbefugnisse erschwert?[26]

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[24] A. Arnull, A. Dashwood, M. Dougan, M. Ross, E. Spaventa, D. Wyatt, The principle of subsidiarity, in: *European Union Law* (Ed: D. Wyatt, A. Daswood), 2006, p. 4-014.

[25] H.-J. Lambers, *op. cit*., S. 231ff.; J. Pipkorn, Das Subsidiaritätsprinzip im Vertrag über die Europäische Union - rechtliche. Bedeutung und gerichtliche Überprüfbarkeit, *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 1992, S. 699; C. Calliess, Der Schlüsselbegriff der ausschließlichen Zuständigkeit in Art. 3 b II EGV, *EuZW* 1995, S. 694ff.

[26] C. Calliess, Kontrolle zentraler Kompetenzausübung in Deutschland und Europa: Ein Lehrstück für die Europäische Verfassung, *Europäische Grundrechtezeitschrift (EuGRZ)* 2003, S. 181ff.

2.1.2. Negativtest[27]

Der Wortlaut des EUV von Amsterdam 1999 "In den Bereichen, die nicht in ihre ausschließliche Zuständigkeit fallen, wird die Gemeinschaft nach dem Subsidiaritätsprinzip nur tätig, sofern und soweit die Ziele der in Betracht gezogenen Maßnahmen auf Ebene der Mitgliedstaaten nicht ausreichend erreicht werden können und daher wegen ihres Umfangs oder ihrer Wirkungen besser auf Gemeinschaftsebene erreicht werden können." ist im Reformvertrag von Lissabon leicht abgeändert worden: "Nach dem Subsidiaritätsprinzip wird die Union in den Bereichen, die nicht in ihre ausschließliche Zuständigkeit fallen, nur tätig, sofern und soweit die Ziele der in Betracht gezogenen Maßnahmen von den Mitgliedstaaten weder auf zentraler noch auf regionaler oder lokaler Ebene ausreichend verwirklicht werden können, sondern vielmehr wegen ihres Umfangs oder ihrer Wirkungen auf Unionsebene besser zu verwirklichen sind."

Der Terminus "*daher*" ist entfallen. Dies bekräftigt die bisher überwiegende Ansicht in der Literatur, dass die Subsidiaritätsprüfung in zwei voneinander getrennt zu subsumierenden Stufen zu erfolgen hat.[28] Der Negativ- und der Positivtest sind kumulativ chronologisch zu prüfen, weder alternativ noch substitutiv. Der Positivtest kann den Negativtest nicht ersetzen.[29] Ansonsten wäre der Negativtest inhaltlich obsolet. Außerdem würde der Grundgedanke des Subsidiaritätsprinzips verkehrt werden, wenn die Stufenprüfung des Negativ- zum Positivtest vereint würde. Denn der Grundgedanke des Subsidiaritätsprinzips fordert ein Primat des Handelns der unteren vor den oberen Ebenen im Staat.

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[27] S. zur Bezeichnung „Negativtest" bspw. H.-J. Lambers, op. cit. S. 235ff. oder U. Mager, Die Prozeduralisierung des Subsidiaritätsprinzips im Verfassungsentwurf des Europäischen Konvents – verbesserter Schutz vor Kompetenzverlagerung auf die Gemeinschaftsebene?, *Zeitschrift für Europarechtliche Studien (ZES)* 2003, S. 474f., womit die im Folgenden behandelte Voraussetzung des Subsidiaritätsprinzips bezeichnet werden soll; teilweise ist auch die Bezeichnung als Erforderlichkeits-/Effektivitätstest in der Literatur vorzufinden, bspw. A. J. Mackenzie-Stuart, *op. cit.*, p. 39.

[28] Zu den Ansichten A. von Bogdandy, M. Nettesheim, Art. 3b EGV Rn. 38, in: *Kommentar EU* (Hg: E. Grabitz, M. Hilf), 1994; C. Calliess, Art. 3b EGV Rn. 34, 38, in: *Kommentar EUV (Vertrag über die Europäische Union)/EGV* (Hg: C. Calliess, M. Ruffert), 2002; F. Ronge, *Legitimität durch Subsidiarität*, 1997, S. 170ff.; W. Hilz, *Subsidiaritätsprinzip und EU-Gemeinschaftsrechtsordnung*, 1998, S. 123.

[29] S. aber A. von Bogdandy, Nettelsheim, Art. 3b Rn. 31, in: *Kommentar EU* (Hg: E. Grabitz, M. Hilf), 1994.

Das Subsidiaritätsprinzip schreibt keine einheitliche oder gar optimale Verwirklichung der Ziele durch die Mitgliedstaaten vor.[30] Dem Wortlaut des Art. 5 EUV zufolge sind der Negativ- und Positivtest anhand der Ziele der Union zu bemessen. Dabei beruht der Test auf einer Prognoseentscheidung.[31] Es wird prognostiziert, ob die Mitgliedstaaten zur Zielverwirklichung in der Lage sind. Hierbei unterliegen die Unionsorgane einem Selbstbeurteilungsmaßstab.[32] Das neue Subsidiaritätsprotokoll mit der detaillierteren Verfahrensausgestaltung soll auch einer Subjektivität aus Sicht der Union entgegen wirken. Dennoch sind weder im Subsidiaritätsprotokoll noch im Tatbestand des Art. 5 III EUV konkreten Kriterien bestimmt worden. Es stellt sich die Frage, ob die Mitgliedstaaten tatsächlich nicht befähigt sind, die Ziele zu verwirklichen oder dies nur potenziell der Fall ist. Dieser Sachverhalt kann wegen beschränkter Kompetenzen oder transnationaler Zusammenhänge vorliegen.[33] Denkbar sind auch Sachverhalte, wonach zwar alle Mitgliedstaaten handeln können, dies aber nicht tun, sei es auch nur wegen fehlender Bereitschaft.[34] Können die Mitgliedstaaten eine Teilverwirklichung der Ziele erreichen, stellt sich die Frage nach dem Maß der Zielerfüllung. Wenn die Mitgliedstaaten die Ziele überwiegend erreichen können, ist erstens fraglich, ob die Union überhaupt tätig werden darf und zweitens, ob dies dann nur bezüglich der nicht erreichten Ziele gilt. Es ist auch zu klären, welche Mehrheitserfordernisse der Negativtest erfordert. Nach demokratischen Maßstäben ist es kaum vertretbar, den Negativtest als erfüllt anzusehen, wenn nur ein Mitgliedstaat nicht zur Verwirklichung der Ziele in der Lage ist.[35] Die Mitgliedstaaten sind hier in ihrer Gesamtheit als erfüllungsfähiges Handlungsorgan anzusehen.[36]

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[30] H.-J. Lambers, *op. cit.*, S. 237; H. D. Jarass (1994), S. 211; A. J. Mackenzie-Stuart, *op. cit.*, p. 37ff.

[31] G. Lienbacher, Art. 5 EGV Rn. 27, in: *EU-Kommentar* (Hg: J. Schwarze), 2009.

[32] M. Steeg, Eine neue Kompetenzordnung für die EU, *EuZW* 2003, S. 327; G. Lienbacher, Art. 5 EGV Rn. 21ff, in: *EU-Kommentar* (Hg: J. Schwarze), 2009; A. Arnull, A. Dashwood, M. Dougan, M. Ross, E. Spaventa, D. Wyatt, The principle of subsidiarity, in: *European Union Law* (Ed: D. Wyatt, A. Daswood), 2006, p. 4-016ff.

[33] L. Gündling in: *Dicke Luft in Europa* (Hg: L. Gündling, R. Weber), 1998, S. 35ff.; H. D. Jarass (1994), S. 209ff.

[34] H.-J. Lambers, *op. cit.*, S. 236.

[35] U. Everling, *op. cit.*, S. 379; M. Zuleegg, Art. 5 Rn. 1, in: *Kommentar EUV/EGV* (Hg: H. von der Groeben, J. Schwarze), 2003.

[36] R. Bieber, A. Epiney, M. Haag, *Die Europäische Union*, 2010, § 3 Rn. 32.

Bei der Auslegung der "ausreichenden" Zielverwirklichung wird die Bedeutung der grammatikalischen Auslegung offenkundig. Mit dem Begriff "ausreichend" bleibt die deutsche Übersetzung hinter Begriffen wie "hinreichend", "effizient" oder "angemessen" zurück. Damit wird den Mitgliedstaaten eine relativ niedrige Erfüllungsgrenze vorgegeben. Ein Blick in die englische Fassung zeigt, dass dort von "sufficient" gesprochen wird. Der Begriff "sufficient" kann unterschiedlich übersetzt und verschiedene Aspekte darunter subsumiert werden. Neben juristischen Begriffen können auch ökonomische oder politische Aspekte in die Bewertung einfließen. Soweit "sufficient" mit „angemessen" übersetzt wird, kann den Mitgliedstaaten ein höherer Erfüllungsanspruch gesetzt werden, als nur eine ausreichende Erfüllung. Diese deutsche Übersetzung entspricht der historischen Situation vor der Einführung des Subsidiaritätsprinzips. Gerade die deutschen Länder haben eine Implementierung des Subsidiaritätsprinzips gefordert, um einer Kompetenzaushöhlung durch die Union entgegen wirken zu können.[37]

2.1.3. Positivtest

"Nach dem Subsidiaritätsprinzip wird die Union in den Bereichen, die nicht in ihre ausschließliche Zuständigkeit fallen, nur tätig, sofern und soweit die Ziele der in Betracht gezogenen Maßnahmen von den Mitgliedstaaten weder auf zentraler noch auf regionaler oder lokaler Ebene ausreichend verwirklicht werden können, *sondern vielmehr wegen ihres Umfangs oder ihrer Wirkungen auf Unionsebene besser zu verwirklichen sind*.".

Wie beim Negativtest handelt es sich um eine Prognoseentscheidung. Im Rahmen der Unionsziele und des Integrationsfortschrittes unterliegt das Subsidiaritätsprinzip einer dynamischen Auslegung.[38] Dieses dynamische Auslegungsverständnis kann sich zu Gunsten der Union auswirken, denn je abstrakter und langfristiger die Ziele definiert werden und je erforderlicher ein Zusammenwachsen der Union im Rahmen der fortschreitenden Integration erachtet wird, desto eher kann eine mitgliedstaatliche

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[37] W. Kahl, Möglichkeiten und Grenzen des Subsidiaritätsprinzips nach Art. 3 b EGV, *AöR* 1993, S. 414ff.; T. Goppel, Die Bedeutung des Subsidiaritäsprinzips, *EuZW* 1993, S. 367.

[38] A. Arnull, A. Dashwood, M. Dougan, M. Ross, E. Spaventa, D. Wyatt, The principle of subsidiarity, in: *European Union Law* (Ed: D. Wyatt, A. Daswood), 2006, p. 4-015.

Kompetenzwahrnehmung als unzulänglich angesehen werden.[39] Dem dynamischen Prinzip kann entnommen werden, dass jeder Prüfung die aktuellen Umstände zu Grunde legen sind und sich das Subsidiaritätsverständnis ändern kann, was im Zweifel sogar eine einer Rückübertragung von Kompetenzen begründen kann.[40] Ansonsten ist die Subsidiaritätsfrage nicht im Sinne eines Alles-Oder-Nichts-Prinzips zu entscheiden, soweit eine differenzierte Behandlung angemessen ist. Die Union kann auch nur komplementär oder unterstützend tätig sein, wenn Kompetenzen teilweise wirksam von den Mitgliedstaaten wahrgenommen werden können.[41] Die Darlegungs- und Beweislast für eine Kompetenzausübung der Union tragen die Unionsorgane.[42]

Letztendlich stellt sich im materiellen Sinn die Frage, wie ein "besseres" Verwirklichen zu beurteilen ist. Hierzu können qualitative und quantitative Kriterien bestimmt werden.[43] Unter wirtschaftlichen Gesichtspunkten kann auch das Verhältnis des Aufwandes und Ertrages berücksichtigt werden. Zahlreiche Kriterien zur Auslegung des Subsidiaritätsgrundsatzes haben sich als unbestimmt erwiesen. Dies galt zum Teil auch für die Kriterien des Subsidiaritätsprotokolls von Amsterdam 1999, lässt sich aber auch an Vorgaben anderer europäischer Organe aufzeigen. So hat der Europäische Rat 1992 zum Positivtest bekundet, dass ein Handeln der Union geboten ist, wenn "deutliche Vorteile" verwirklicht werden können.[44] Solange aber kein einheitliches Auslegungsverständnis besteht, kann im Zweifel der Grundgedanke des Subsidiaritätsprinzips Ausschlag gebend sein.[45]

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[39] Bereits zum Amsterdamer Vertrag im Zusammenhang mit dem Subsidiaritätsprinzip H. D. Jarass (1994), S. 218f.

[40] So noch Ziffer 3 Subsidiaritätsprotokoll Nr. 30 zum EUV Amsterdam 1999.

[41] Hierzu W. Frenz, *Das Verursacherprinzip im Öffentlichen Recht*, 1997, S. 201ff.; T. Döring, *Subsidiarität und Umweltpolitik in der Europäischen Union*, 1997, S. 35; S. U. Pieper, *op. cit*., S. 72.

[42] G. Walther in: *Subsidiarität als rechtliches und politisches Ordnungsprinzip in Kirche, Staat und Gesellschaft* (Hg: P. Blickle, T. O. Hüglin, H. Wyduckel), 2002, S. 123.

[43] H.-J. Lambers, *op. cit*., S. 237.

[44] Presse- und Informationsamt der Bundesregierung, Bulletin 1992, 1281.

[45] M. Zimmermann, *Bürgernahes Europa Ziel und Umsetzung des Subsidiaritätsgedankens*, 2010.

3. DAS SUBSIDIARITÄTSVERFAHREN NACH DEM SUBSIDIARITÄTSPROTOKOLL

Zunehmend wird der Unbestimmtheit des Subsidiaritätsgrundsatzes durch eine Rechtspositivierung entgegen gewirkt, was an der Präzisierung des Wortlauts des Art. 5 III EUV und der Detaillierung des Subsidiaritätsprotokolls zu ersehen ist.[46] Das Gesetzgebungsverfahren in der Union wurde zur Konkretisierung des Subsidiaritätsprinzips mit speziellen Verfahrensrechten zu Gunsten der Mitgliedstaaten ausgestaltet.[47] Dies sind zum einen Informations-, Anhörungs- und Begründungs-, zum anderen Interventionsrechte.[48] Da die Mitgliedstaaten und ihre nationalen Parlamente frühzeitig mit Rechten im Gesetzgebungsverfahren ausgestattet sind, wird das Gesetzgebungsverfahren im Sinne des Subsidiaritätsverfahrens in der Literatur als "Frühwarnsystem" bezeichnet.[49] Im englischen Sprachgebrauch wird von einem "pre-warning-system", "ex-ante-monitoring-process" oder schlicht einer "yellow/red-card-process" gesprochen.[50] Den Mitgliedstaaten steht im Subsidiaritätsverfahren das Recht der begründeten Stellungnahme zu Gesetzgebungsentwürfen der Union als sog. Subsidiaritätsrüge zu. Die Ultima Ratio bildet die Subsidiaritätsklage.[51]

Insbesondere die Einbindung der nationalen Parlamenten und ihrer zweiten Kammern in das europäische Gesetzgebungsverfahren hat ein neues Verständnis der Kooperation und Demokratisierung geschaffen. Eine Subsidiaritätsrüge der nationalen Parlamente kann zur Aufhebung eines Gesetzgebungsentwurfes führen. Bei einer Mehrheit von einem Drittel der

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[46] H. Lübbe, Subsidiarität, Zur europarechtlichen Positivierung eines Begriffs, *Zeitschrift für Politik (ZfP)* 2005, S. 157ff.,".

[47] Zu der Entwicklung M. Schröder, Die Parlamente im europäischen Entscheidungsgefüge, *EuR* 2002, S. 301ff.; zu den Vor- und Nachteilen eines gestuften Verfahrens U. Goll, M. Kenntner Brauchen wir ein Europäisches Kompetenzgericht?, *EuZW* 2002, S. 103.

[48] C. Mellein, Subsidiaritätskontrolle durch nationale Parlamente, Eine Untersuchung zur Rolle der mitgliedstaatlichen Parlamente in der Architektur Europas, 2007; R. Uerpmann-Wittzack, A. Edenharter, Subsidiaritätsklage als parlamentarisches Minderheitenrecht, *EuR* 2009, S. 313ff.

[49] Bspw. G. Lienbacher, Art. 5 EGV Rn. 35ff, in: *EU-Kommentar* (Hg: J. Schwarze), 2009.

[50] Hierzu auch J. Schwarze (Hg.), Einführung: Der Reformvertrag von Lissabon Rn. 34, *EU-Kommentar*, 2010.

[51] Vgl. zu den Rechten und Pflichten der nationalen Parlamente im Zusammenhang mit dem Subsidiaritätsgrundsatz auch Art. 12 lit. b) EUV.

Stimmen der nationalen Parlamente ist ein europäischer Gesetzgebungsentwurf nochmals zu überprüfen und der Entwurf zu begründen. Bei einer einfachen Mehrheit der Stimmen der nationalen Parlamente ist der Gesetzgebungsentwurf sogar mit den Begründungen der nationalen Parlamente und der Unionsorgane an das Europäische Parlament weiter zu leiten, das prüft, ob der Subsidiaritätsgrundsatz eingehalten wurde. Entscheidet eine einfache Mehrheit des Europäischen Parlaments oder fünfundfünfzig Prozent der Mitglieder des Rates, dass ein Verstoß gegen den Grundsatz der Subsidiarität vorliegt, ist der Gesetzgebungsakt einzustellen.

Die Teilnahme der nationalen Parlamente kann aus demokratischer Sicht begrüßt werden. Jedoch steht die Stärkung des demokratischen Prinzips in dieser Form in einem Spannungsverhältnis mit dem europäischen Grundsatz der Effektivität und fortschreitenden Integration. Denn europäische Gesetzgebungsverfahren können so verlängert, erschwert oder zum Stillstand geführt werden. Dieses Spannungsverhältnis ist bereits im EUV angelegt. Während Art. 5 III EUV den Grundsatz der Subsidiarität mit seiner Akzentuierung der Bürgernähe, des Demokratie- und Föderalismus-grundsatzes betont, ist dem Art. 5 III EUV über den Begriff der Ziele[52] das Wohl der Union, der Grundsatz der Effektivität und fortschreitenden Integration als Maßstab zu Grunde gelegt.[53]

Der Demokratiegrundsatz wird weiter durch den Ausbau der Minderheitenrechte in den Mitgliedstaaten betont. Der deutsche Verfassungsgeber hat dies ausdrücklich im Grundgesetz verankert. Die (parlamentarische) Opposition bildet einen Wesensbestandteil des Demokratieprinzips. Das Minderheitenrecht ist als spiegelbildliches Recht zum Mehrheitsprinzip zu sehen, da ansonsten die Minderheit stets strukturell unterlegen wäre. Mit dem Grundsatz der Demokratie verbunden ist das Strukturprinzip des Föderalismus, das staatsorganisationsrechtlich seinen Ausdruck im Bundesrat findet, einer Art zweiten Parlamentskammer. Aus diesen Gedanken heraus hat der deutsche Gesetzgeber ein Minderheitenrecht in der Verfassung verankert.[54] Demnach muss bei einem

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[52] Vgl. insbesondere Art. 3 EUV.

[53] W. Frenz (2010), S. 644.

[54] Art. 23 I a 2 GG; H. D. Jarass, Art. 23 Rn. 46ff., in: *GG Kommentar* (Hg: H. D. Jarass, B. Pieroth), 2011.

entsprechenden Beschluss der Minderheit der Deutsche Bundestag eine Subsidiaritätsklage beim EuGH anstreben.[55]

Die Interdependenz des formellen Subsidiaritätsverfahrens und des materiellen Subsidiaritätsgrundsatzes lässt sich bereits anhand der achtwöchigen Rügefrist des Subsidiaritätsprotokolls für die nationalen Parlamente aufzeigen. Nach Übermittlung eines Gesetzgebungsentwurfs an die nationalen Parlamente haben diese innerhalb von acht Wochen eine Stellungnahme abzugeben, wenn sie das Subsidiaritätsprinzip als nicht eingehalten ansehen.[56] Wie entscheidend dieser prozessuale Aspekt war, lässt sich auch anhand des Diskurses zur Fristlänge ersehen. Die anfänglich geplante Frist von sechs Wochen wurde als unangemessen kritisiert. Denn innerhalb der Frist können 27 nationale Parlamente und soweit vorhanden ihre zweiten Kammern den Gesetzgebungsentwurf zu evaluieren, zu kommentieren und untereinander abzustimmen. Dies wirft die Frage nach einer spezifischen Organisations- und Kommunikationsform für europäische Gesetzgebungsakte auf. Hierfür könnte ein Sonderausschuss der jeweiligen Parlamente eingerichtet werden. Über die Organisation hinaus stellen sich weitere Entscheidungsfragen. Ist die Kreations- und Abschlussveranwortung einem Mitgliedstaat zu übertragen? Soll dies nach dem Rotationsprinzip erfolgen? Müssen alle Mitgliedstaaten dieselbe Ansicht vertreten? Müssen alle Mitgliedstaaten am Rügeverfahren teilnehmen? Da in der Rüge die Gründe für einen Verstoß gegen das Subsidiaritätsprinzip anzuführen und zu erläutern sind, hängt der materielle Erfolg von der prozessualen Ausgestaltung des Subsidiaritätsverfahrens ab. Hierzu finden sich keine detaillierten Regelungen im Subsidiaritätsprotokoll.

Das Verhalten im Subsidiaritätsverfahren kann von Bedeutung sein für spätere Gerichtsverfahren. Die Art der Stellungnahme der nationalen Parlamente, die Einheitlichkeit des Vorgehens und der Argumente, ihre Gewichtung oder Widersprüchlichkeit können als materielles Indiz für die Bewertung des Subsidiaritätsprinzips dienen. Sollten die nationalen Parlamente oder einzelne von Ihnen Ihre Verfahrensmöglichkeiten nicht ausgenutzt haben oder die Wahrnehmung bestimmter Rechte unterlassen haben, kann Ihnen dies inhaltlich negativ entgegen gehalten werden.

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[55] P. Molsberger, *Das Subsidiaritätsprinzip im Prozess der europäischen Konstitutionalisierung*, 2009, S. 200ff.

[56] Art. 6 Subsidiaritätsprotokoll.

4. JUSTITIABILITÄT

4.1. Grundsatz der Bestimmtheit

Wegen der Unbestimmtheit des Subsidiaritätsprinzips wurde seine Justitiabilität[57] vereinzelt hinterfragt. Die Unbestimmtheit des Prinzips an sich sowie des Tatbestandes wird als Indiz dafür herangezogen, der Subsidiaritätsgrundsatz sei lediglich eine unverbindliche, politische Vorgabe für die Kompetenzausübung.[58] Zum Teil wird das Subsidiaritätsprinzip als politische Entscheidungsgrundlage gesehen, die nur beschränkt überprüfbar sei, womit zugleich die Justitiabilität hinterfragt werden kann. Demnach liege dem Erforderlichkeitskriterium keine Erforderlichkeitsprüfung zu Grunde, sondern lediglich eine Offensichtlichkeits- oder Plausibilitätskontrolle.[59] Die Unionsorgane sprechen in ihren Dokumenten teilweise sogar von einem Richtliniencharakter. Dem widerspricht die Mehrheit in Literatur und Rechtsprechung.[60] Aus der Unbestimmtheit des Wortlauts alleine kann die Justitiabilität nicht verneint werden.[61] Es ist der gesamte Gesetzestext, Zusammenhang und Hintergrund zu berücksichtigen. Aus dem Reformvertrag mit den Erweiterungen der spezifischen Subsidiaritätsrügen

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[57] P. M. Schmidhuber, Gerhard Hitzler, Die Verankerung des Subsidiaritätsprinzips im EWG-Vertrag, *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 1992, S. 724f.; C. Ritzer, M. Ruttloff, Die Kontrolle des Subsidiaritätsprinzips: geltende Rechtslage und Reformperspektiven, *EuR* 2006, S. 116ff.; G. Lienbacher, Art. 5 EGV Rn. 25ff., in: *EU-Kommentar* (Hg: J. Schwarze), 2009; C. Calliess (2003), S. 183ff.; für eine Justitiabilität nur bei Ermessensüberschreitungen B. Schima, *op. cit.*, S. 139ff.; für eine Justitiabilität J. Pipkorn, *op. cit.*, S. 697; S. U. Pieper, *op. cit.*, S. 271ff.

[58] H.-J. Blanke, Der Unionsvertrag von Maastricht – Ein Schritt auf dem Weg zum europäischen Bundesstaat, *DÖV* 1993, S. 421, der von einem kaum justitiablen soft-law-Charakter spricht D. Grimm, Effektivität und Effektivierung des Subsidiaritätsprinzips, *Kritische Vierteljahreszeitschrift (KritV)* 1994, S. 6ff.; I. Pernice, Harmonisation of Legislation in Federal Systems: Federal and Subsidiarity Aspects Revisite, *Columbia Journal of European Law (CJEL)* 1996, p. 408f.

[59] G. Ress, Die neue Kulturkompetenz der EG, *Die Öffentliche Verwaltung (DÖV)* 1992, S. 948f.; B. Schima, *op. cit.*, S. 139ff.; H.-J. Blanke, Normativität und Justitiabilität des gemeinschaftsrechtlichen Subsidiaritätsprinzips, *Zeitschrift für Gesetzgebung (ZfGesegeb)* 1995, S. 193; G. Lienbacher, Art. 5 EGV Rn. 25, in: *EU-Kommentar* (Hg: J. Schwarze), 2009.

[60] Bereits bei der Einführung des allgemeinen Subsidiaritätsprinzips in das primäre Gemeinschaftsrecht T. Stein, Subsidiarität als Rechtsprinzip, in: *Die Subsidiarität Europas* (Hg: D. Merten), 1993, S. 35ff.; C. Calliess (1999), S. 259, 267.

[61] A. Arnull, *The European Union and its Court of Justice*, 1991, p. 551f.

und -klagen geht der gesetzgeberische Wille zur Justitiabilität hervor. Die systematische Stellung des Subsidiaritätsprinzips in Art. 5 EUV verdeutlicht, dass es sich um eine zentrale Rechtsnorm handelt.[62] Das Europäische Parlament hatte bereits 1990 die Einfügung eines Artikels 172 a EWGV beabsichtigt, der dem Gerichtshof das Recht einräumen sollte, zu überprüfen, ob ein Rechtsetzungsvorschlag die Grenzen der Gemeinschaftskompetenz überschreite.[63] Die im Subsidiaritätsprotokoll weiter detaillierte Begründungspflicht der Union kann als Indiz für die Justitiabilität angeführt werden. Ein rein erläuternder Charakter ohne eine gerichtliche Überprüfbarkeit würde das Begründungserfordernis entwerten.[64] In seinen Urteilen vom 12. November 1996[65] und vom 13. Mai 1997[66] stellte der EuGH klar, dass die Einhaltung des Subsidiaritätsprinzips zu den Umständen zählt, die von der Begründungspflicht gemäß Art. 253 (Artikel 190) EGV umfasst werden.

4.2. Subsidiaritätsklage

4.2.1. Unterfall der Nichtigkeitsklage

Bei der Subsidiaritätsklage handelt es sich um einen Unterfall der Nichtigkeitsklage. Der EuGH ist gemäß Art. 8 Subsidiaritätsprotokoll für Klagen wegen Verstoßes eines Gesetzgebungsakts gegen das Subsidiaritätsprinzip zuständig, die nach Maßgabe des Artikels 263 AEUV von einem Mitgliedstaat erhoben oder entsprechend der jeweiligen innerstaatlichen Rechtsordnung von einem Mitgliedstaat im Namen seines nationalen Parlaments oder einer Kammer dieses Parlaments übermittelt werden. Wie im Verfassungsvertrag von Laeken sind im Reformvertrag von Lissabon, um das Subsidiaritätsprinzip zu stärken, im Gesetzgebungsverfahren die Mitteilungs- und Begründungserfordernisse der Union und der Kreis der Rüge- und Klageberechtigten erweitert worden.

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[62] T. Stein, op. cit., S. 36ff.; S. U. Pieper, *op. cit*., S. 271ff.; H. D. Jarass, *Grundfragen der innerstaatlichen Bedeutung des EG-Rechts,* 1994, S. 22f.; M. Zuleeg, Justitiabilität des Subsidiaritätsprinzips, in: *Subsidiarität: Idee und Wirklichkeit, Zur Reichweite eines Prinzips in Deutschland und Europa* (Hg: K. W. Nörr, Th. Oppermann), 1997, S. 191ff.

[63] Th. Oppermann, C. D. Cassen, Die EG vor der Europäischen Union, *NJW* 1993, S. 8.

[64] J. Pipkorn, *op. cit*., S. 700.

[65] EuGH, Slg. I-5755 (Rs. C-84/94).

[66] EuGH, Slg. I-2405 (Rs. C-233/94).

4.2.2. Prüfungsinstanz

Um die Prüfungsdichte zu erhöhen, wurde die Einführung unterschiedlicher Verfahren und Organe angedacht. Angestrebt wurde eine stärkere Zusammenarbeit mit dem Ausschuss der Regionen, den nationalen Parlamenten, regionalen und lokalen Ebenen.[67] Präventiv sollte eine Art Subsidiaritätsausschuss[68] eingerichtet werden, welcher als politisches Schlichtungsorgan schon im Subsidiaritätsverfahren zu einvernehmlichen Einigungen führen sollte. Spätestens jedoch bei den Fragen zur Besetzung, der Bestimmung von Quoren, Mehrheitsverhältnissen und Befugnissen eines solchen Organs konnte keine Einigung erzielt werden.[69] Ähnliche Hindernisse entstanden bei Vorschlägen zu einem Vermittlungsausschuss[70] oder Kompetenzbeauftragten[71]. Letztendlich wurde die Idee der Errichtung eines spezifischen Spruchkörpers aufgeworfen.[72] Als letzte Instanz wurde eine Spezialkammer des Europäischen Gerichtshofes für Subsidiaritäts-angelegenheiten oder eine Art Kompetenzgericht[73] vorgeschlagen. Derartige institutionelle Reformansätze konnten sich aber nicht durchsetzen. Die Mehrheit der Beteiligten sprach sich dagegen aus, das institutionelle Gleichgewicht in der Union oder die Stellung des EuGH zu relativieren. Angeführt wurde insbesondere Art. 220 EGV, demnach die „Wahrung des Rechts" dem EuGH zusteht. Einer Schaffung weiterer oder paralleler Strukturen sollte die Stärkung materieller und personeller Verfahren und

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[67] A. von Bogdandy, J. Bast, Die vertikale Kompetenzordnung in der Europäischen Union, *EuGRZ* 2001, S. 445.

[68] I. Pernice, Kompetenzabgrenzung im Europäischen Verfassungsverbund, *Juristische Zeitung (JZ)* 2000, S. 876.

[69] C. König, A. Lorz, Stärkung des Subsidiaritätsprinzips, *JZ* 2003, S. 172.

[70] J. Schwarze, Kompetenzverteilung in der Europäischen Union und föderales Gleichgewicht, *DVBl* 1995, S. 1267.

[71] F. Mayer, Kompetenzüberschreitung und Letztentscheidung, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* 2001, S. 607.

[72] U. Goll, M. Kentner, Brauchen wir ein Europäisches Kompetenzgericht?, *EuZW* 2002, S. 101ff.; P. L. Lindseth, Democratic Legitimacy and the Administrative Character of Supranationalism, *Columbia Law Review* 1999, p. 726.

[73] H. Lecheler, *op. cit.*, S. 106ff.

Institutionen bevorzugt werden. Politisch war eine Grund legende Änderung der Gerichtsbarkeit nicht vom Willen der Vertragsparteien gedeckt.[74]

4.2.3. Rechtsprechungsverständnis des EuGH

Bemerkenswert ist, in welchem Maße der EuGH die Prüfung des Subsidiaritätsprinzips meidet.[75] Im Tabakwerbeverbotsurteil[76] stellte er fest, dass die Tabakwerbe-Richtline nicht mit Art. 5 I in Verbindung mit Art. 95 EGV vereinbar sei. Er hat es nach dieser Feststellung unterlassen, auf Art. 5 II EGV, also das Subsidiaritätsprinzip, näher einzugehen. Umso bemerkenswerter ist ein abweichendes Prüfungsverhalten des EuGH im Urteil zur Arbeitszeit-Richtlinie[77]. Das Gericht hat den Tatbestand der Art. 5 EGV von hinten geprüft und sich auf das Prinzip der Verhältnismäßigkeit konzentriert.[78] Eine Entscheidung zum Subsidiaritätsprinzip in Art. 5 II EGV wurde ausgespart.

Dem Rat wird vom EuGH wegen der Harmonisierungsbedürfnisse ein weiter Harmonisierungsspielraum zugesprochen.[79] Einer derartigen Mittel-Zweck-Relation ist die Gefahr eines Zirkelschluss inhärent. Der EuGH erkennt den Unionsorganen einen weit gehenden Prognosespielraum zu und geht daher nur von einer rechtlichen Evidenzkontrolle aus (vgl. zur Biopatent-Richtlinie 2001)[80]. Wenn das Subsidiaritätsprinzip unmittelbar betroffen ist, stützt der EuGH unionsfreundliche Auslegungen. Der EuGH stellt keine hohen Maßstäbe an eine formelle und detaillierte Begründung der Unionsorgane.[81]

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[74] Grund legend I. Pernice, Die dritte Gewalt im europäischen Verfassungsverbund, *EuR* 1996, S. 27ff.; kritisch C. Mayer, *Kompetenzüberschreitung und Letztentscheidungsrecht*, 2000, S. 335ff.

[75] C. Ritzer, M. Ruttloff, Die Kontrolle des Subsidiaritätsprinzips: Geltende Rechtslage und Reformperspektiven, *EuR* 2006, S. 116; A. Arnull, A. Dashwood, M. Dougan, M. Ross, E. Spaventa, D. Wyatt, The principle of subsidiarity, in: *European Union Law* (Ed: D. Wyatt, A. Daswood), 2006, p. 4-017, 4-020.

[76] EuGH Slg. 2000, I-8419; hierzu S. Weatherill, *Cases and Materials on EU Law*, 2007, p. 48ff., 629ff.; C. Calliess, Kompetenzverfassung in neuem Licht, *Jura* 2001, S. 311ff.

[77] EuGH Slg. 2000, I-5755.

[78] Hierzu C. Calliess, Rechtmäßigkeit der Arbeitszeitrichtlinie, *EuZW* 1996, S. 751ff.

[79] EuGH Slg. 1996, I-5755, speziell Randnummer 47.

[80] EuGH Slg. 2001, I-7079.

[81] R. Bieber, in: *Subsidiarität: Idee und Wirklichkeit* (Hg: K. W. Nörr/Th. Oppermann), 1997, S. 180f.

Selbst bei einer fehlenden Begründung der Union hat der EuGH eine solche als implizit vorausgesetzt oder als offenkundig vorhanden angesehen. Ansonsten genügen dem EuGH formelhafte, partielle Begründungsansätze, Textbausteine oder die Herstellung eines Sachbezuges zu anderweitigen Ausführungen.[82] Dieses Gesamtverständnis ist jedoch gerade im Lichte der grammatikalischen Auslegungsmethode fraglich. Der Wortlaut des Art. 5 III EUV spricht bei den unteren (Staats-) Ebenen von „verwirklicht werden können". Dies ist ein Tatbestandsmerkmal, das vom Wortlaut her anhand objektiver Kriterien oder zumindest Indizien überprüfbar sein sollte.[83] 2002 hat der EuGH das Subsidiaritätsprinzip in einem Urteil unmittelbarer geprüft. Bei der Richtline zur Abgleichung der Rechtsvorschriften über die Herstellung, die Aufmachung und den Verkauf von Tabakerzeugnissen äußert der EuGH sich aber nur kurz zum Negativtest. Er verlegt seinen Begründungsschwerpunkt auf den Positivtest und verweist hauptsächlich auf die Verhältnismäßigkeitsprüfung. Die im Primärrecht angelegte zweistufige Prüfung des Subsidiaritätsprinzips wurde durch die einseitige Betonung des Positivtest faktisch zu einer einfachen Einstufenprüfung gewandelt. In wie weit die unteren (mitgliedstaatlichen) Ebenen in der Lage waren eine wirksame Verwirklichung vorzunehmen, wurde nicht geprüft.

Die abstrakten Zielsetzungen der Union eröffnen ein politisches Ermessen, dass die gerichtliche Überprüfbarkeit erschwert. [84] Die zurückhaltende Rechtsprechungspraxis des EuGH zeigt, dass sich das Gericht selbst offen an den Grundsatz des Judicial Self Restraint bindet.[85] So wird dem EuGH vorgeworfen, in seinen Effektivitätsbeurteilungen das Prinzip des Effet Utile einseitig zu Gunsten der Union auszulegen.[86] Der EuGH wird zu einer intensiveren Überprüfung des Subsidiaritätsprinzips aufgefordert.[87]

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[82] Bspw. EuGH Slg. 1997, I-2405; zu Begründungserfordernissen C. Calliess (2003), S. 182.

[83] H. D. Jarass (1994), S. 210f.; W. Frenz, *Nationalstaatlicher Umweltschutz und EG-Wettbewerbsfreiheit*, 1997, S. 76.

[84] A. von Bogdandy, Martin Nettesheim, Art. 3b EGV Rn. 41, in: *Kommentar EU* (Hg: E. Grabitz, M. Hilf), 1994.

[85] Vgl. bspw. EuGH, Rs. C-84/94, Vereinigtes Königreich/Rat, Slg. 1996, I-5755; EuGH, Rs. C-233/94, Deutschland/Europäisches Parlament, Rat, Slg. 1997, I-2405; zur "politischen Enthaltung" des EuGH W. Robinson, *op. cit*., p. 187-9; Brittan, *op. cit*., p. 567ff.

[86] C. Calliess (1999), S. 351ff.; C. König, A. Lorz, *op. cit*., S. 169.

[87] C. Calliess, Art. 5 Rn. 60, in: *Kommentar EU* (Hg: C. Calliess, M. Ruffert), 2002.

Die stärkere Einbindung der nationalen Parlamente in das Gesetzgebungsverfahren, die Einführung des Frühwarnsystems und der Subsidiaritätsrügen begründen für die Mitgliedstaaten nicht lediglich eine Rechtserweiterung. Spiegelbildlich kann in späteren Gerichtsverfahren eine Rechtseinschränkung begründet werden, denn je stärker die Mitgliedstaaten im Gesetzgebungsverfahren eingebunden waren, desto eher müssen sie sich Rechtshandlungsversäumnisse zurechnen lassen und der EuGH entsprechend seine Prüfungsdichte eingrenzen.[88] Bei einstimmigen Entscheidungen unter Beteiligung der Mitgliedstaaten wird sogar eine Einhaltung des Subsidiaritätsprinzips unterstellt.[89] Denn die Mitgliedstaaten, ihre Regierungen und Parlamente hatten im Gesetzgebungsverfahren Handlungsmöglichkeiten auf mehreren Verfahrensstufen. Die Nichtausübung von Rechten oder die nicht vollständige Inanspruchnahme kann als materielles Indiz gewertet werden. Hierbei kann sich die Union auf die Prinzipien des gemeinschaftsfreundlichen Verhaltens über die Kooperation und den Integrationsprozess bis zu einem Rechtsvertrauen in die gemeinsamen Verfahrensbestimmungen berufen.

4.2.4. Rechtsprechungsverständnis der mitgliedstaatlichen Gerichte

Neben dem EuGH ist gerade in Bezug auf das Subsidiaritätsprinzip das Verhalten der mitgliedstaatlichen Gerichte zu berücksichtigen, insbesondere der nationalen Verfassungsgerichte. Inzwischen wird der Geltungsvorrang des Rechts der Europäischen Union gegenüber mitgliedstaatlichem Recht anerkannt. Die dogmatischen Begründungen[90] hierfür unterscheiden sich jedoch und stellen ein Risiko dar, da die Anerkennung des Geltungsvorrangs auf diesen dogmatischen Argumentationen beruht. Das deutsche Bundesverfassungsgericht hat betont, seine Rechtsprechungskompetenz im Sinne eines Kooperationsverhältnisses nicht auszuüben, soweit ein generell wirksamer Grundrechtsschutz gewährleistet ist.[91] Das Bundesverfassungsgericht behält sich aber die Prüfung der Rechtmäßigkeit der Übertragung von

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[88] So schon 1992 vor Einführung eines Rüge- und Klageverfahrens J. Pieper, Subsidiaritätsprinzip – Strukturprinzip der Europäischen Union, *DVBl* 1993, S. 712.

[89] H. D. Jarass (1994), S. 212.

[90] R. Bieber, A. Epiney, M. Haag (Hg.), *Die Europäische Union*, 2011, §2 Rn. 78ff.; C. Vedder, Art. I-6, in: *Europäischer Verfassungsvertrag Handkommentar* (Hg: C. Vedder, W. H. von Heinegg), 2004.

[91] BVerfGE 89, 188 ("Maastricht-Urteil").

Hoheitskompetenzen vor. Der (Integrations-) Gesetzgeber sei nicht befugt die Grundstrukturen des Grundgesetzes wie das Rechtsstaats-, Demokratie- oder Bundesstaatsprinzip auszuhöhlen. In seinem Lissabon-Urteil hat das Bundesverfassungsgericht seine Ansicht bekräftigt und zwar konkret anhand des Subsidiaritätsprinzips.[92] Dieses Prinzip alleine fällt nicht in die originäre Zuständigkeit des Bundesverfassungsgerichtes. Dennoch stellt es eine Verbindung zwischen zwei Prinzipien her, dem Subsidiaritätsprinzip und der Ultra-Vires-Kontrolle. Damit betont das Bundesverfassungsgericht einen Zusammenhang, der in Art. 5 EUV selbst einen Ansatz findet. Die Prinzipien der begrenzten Einzelermächtigung, der Subsidiarität und Verhältnismäßigkeit stehen in einem Rangfolgeverhältnis. Das Bundesverfassungsgericht sieht es als zulässig an, um seine Ultra-Vires-Kontrolle ausüben zu können, das Subsidiaritätsprinzip implizit zu prüfen. Je verständlicher und schlüssiger der EuGH seine Prüfungspflicht ausübt, desto geringere Angriffsflächen werden den mitgliedstaatlichen Gerichten geboten.

5. ZUKÜNFTIGE AUSLEGUNG DES SUBSIDIARITÄTSPRINZIPS

Die Auslegung des Subsidiaritätsprinzips ist inzwischen zusätzlich durch das Subsidiaritätsprotokoll geprägt. Trotz der detaillierten Verfahrensregelungen und gerade wegen des Zugeständnisses weiterer Beteiligungs- und Klagerechte wird das Subsidiaritätsverfahren komplexer. Alleine die Änderungen des Subsidiaritätsprotokolls von Lissabon 2009 gegenüber Amsterdam 1999 und der Diskurs um die Rügefrist zeigen, welche unterschiedlichen Ansichten vertreten werden. Bei genauerem Hinschauen erweist setzt aber auch das Subsidiaritätsprotokoll keine definitiven Entscheidungskriterien. Es verbleibt bei der Auslegung des Prinzips an sich. Umso bedeutsamer ist daher die Einhaltung des rechtlichen Prüfungsschemas und der Auslegungsgrundsätze. Dies gilt auch für den EuGH, der den Tatbestand des Art. 5 EUV chronologisch zu prüfen und den Negativ- und Positivtest separat zu würdigen hat. Das Schlagwort des „Frühwarnsystems" verdeutlicht, dass die Gesetzgeber vorrangig präventive, einvernehmliche Verfahrenslösungen anstreben, um Klagen zu vermeiden. Dies ist insofern geschickt, als die nationalen Parlamente ein Verfahren schwieriger kritisieren können, in das sie selbst eingebunden waren. Die 27 nationalen Parlamente werden daher ein Organisations- und Kommunikationssystem einrichten müssen, um ihre Rechtsstellung effektiv

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[92] BVerfG (Bundesverfassungsgerichtsentscheidung), 123, 267 ("Lissabon-Urteil").

und angemessen ausfüllen zu können. Dies verdeutlicht das Ineinandergreifen von Verfahrensrechten mit materiellen Ansprüchen.

Dem EuGH kommt bei der Festigung der Rechtssicherheit und des Rechtsfriedens eine entscheidende Rolle zu, da sich das Spruchverhalten auf das Klageverhalten und die Beteiligten im Subsidiaritätsverfahren auswirken dürfte. Eine politische Auslegung des Subsidiaritätsprinzips wird umso schwieriger, wenn das Subsidiaritätsprinzip einem strukturierten rechtlichen Prüfungsschema unterworfen wird. Solange kein einheitliches, konkretes Auslegungsverständnis gefunden wird, werden die Mitgliedstaaten sich auf den Grundgedanke des Subsidiaritätsprinzips berufen können, demnach in dubio pro reo der unteren Ebene erst einmal der Vorrang gegenüber der oberen Ebene eingeräumt werden kann.

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pp. 27- 49.

CONSTITUTIONAL MIXITY OF EC AND EU ECJ C-91/05, COMMISSION V. COUNCIL

1. THEORETICAL BACKGROUND OF DISPUTE

1.1. Unclear line in the competence division between the EC and the EU

The root of dispute in case 91/05 Commission v Council[1], could be search in broad and unclear or "fuzziness"[2] provisions delimiting competences between EC and EU Treaties on one side and, from their overlapping, on the other side. From there derive the understandings that "the current Treaties establish a patchwork of individual external policies with specific objectives and mandates for action,"[3] and that "watertight separation" of different EU policy provisions of EU Treaty (further: TEU) concerning Common Foreign and Security policy (CFSP, Title V TEU) and cooperation in judicial and criminal

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1 Case C-91/05, *Commission v Council*, [2008] ECR I-3651.

2 C. Hillion, R. Wessel, Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness, *CML Rev.*, 46(2009), 551-586, at p. 551

3 D. Thym, Foreign Affairs, Forthcoming in: *Principles of European Constitutional Law*, 2nd ed., (ed. Bogdandy, Bast), Hart 2009, available on: http://pernice.rewi.hu-berlin.de/index.php?id=140, p. 3.

matters (Title VI TEU)[4] was not workable. Because of that, the issue of clear determination of competences of EC and EU and their delimitation has become one of the main issues[5] in community law and EU law and practice, answer of which influence not only on the legal status of the EU, but on maintenance and preserving of attaining *acquis communautaire* in the European Community. In that sense, the issue of delimitation of the EC and EU competences is not only legal issue,[6] but high level political one. Therefore, this issue can not be approached only from the legal point of view, because "the specificity of the CFSP lies in the fact that conducting a purely legal analysis here is almost impossible without considering its actual policy and characteristics."[7]

On the other side, this issue can be approached from the substantive as well as the procedural point of view. From the substantive point of view, it is necessary to delimit competences between the EC and the EU *ratione materiae*, and to determine the questions and fields of acting of the EC and the EU. Such a division would make it possible to create a list of concrete competences and solve the problem of the nowadays-existing patchwork division.

With regard procedural point of view, the competences can be divided according to the applied procedure in their exercising, e.g. according the process of decision-making by the competent institutions. We have in mind that in the first pillar, which is in the EC, decisions are made mostly by qualified majority voting, while the second and third pillar are characterized by consensus and intergovernmental decision-making procedures.

Only after having clearly determined which competences are conferred on the EC and EU, it is possible to find the appropriate legal base for measures

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[4] C. Hillion, R. Wessel, *op. cit.*, p. 551.

[5] See European Convention Secretariat, Delimitation of Competition between the European Union and the Member States, - Existing system, problem and avenues to be explored, CONV 47/02, Brussels, 15 May, 2002, available on: http://register.consilium.eu.int/pdf/en/02/cv00/00047en2.pdf See also, Case C-170/96 *Commission v Council (The Airport Transit Visa case)*, [1998] ECR I-2763.

[6] R. A. Wessel, *The European Union's Foreign and Security Policy*, Kluwer Law International, The Hague 1999.

[7] M. Brkan, Exploring EU Competence in CFSP: Logic or Contradiction?, *CYELP* 2 [2006], pp. 173-207, p. 174, at: http://hrcak.srce.hr/file/44718.

and actions that can be taken by their institutions, as well as the measures for protection of interests in the case of violation of legal base. We should keep in mind that the EC and EU can only act in framework of conferred competences or attributed competences. In that sense the respecting of conferred competences represents constitutional principle, which is known as the principle of maintaining or preserving constitutional balance.

From a legal point of view, the principle of institutional balance is one "manifestation of rule that the institutions have to act within the limits of their competences" and refers to the fact that "the Community institutional structure is based on the division of powers between the various institutions established by the treaties."[8] The proposal of this principle is similar to the Montesquieu's principle of separation of powers, which aimed "to protect individuals against the abuse of power. In the absence of a separation of powers (in EC and EU), the principle of institutional balance made it possible to guarantee to undertakings that a modification of the institutional balance would not call into question the decision-making process envisaged by the treaties and accompanying guarantees provided by the treaties."[9] On the other side, this principle aims to prohibit any encroachment by one institution on the powers conferred to other institution in order to not only maintain balance (to protect interests of institutions and member states[10]), but also to protect the interests of private individuals.[11] In general, the principle institutional balance aims to protect community heritage (*acquis communautaire*) and simultaneously, to enable the EU to exercise its competences in areas of CFSP and PJCC in order to attain its aims.

Having in mind that competences are envisaged in the pillars (First, Second and Third), we can say about the constitutional balance between Pillars, that it is an interpillar or cross-pillar balance. The protection of cross-pillar balance

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[8] J-P. Jacque, The Principle of Institutional Balance, *CMLRev*., 41(2004), 383-391, at p. 383. The author refers on Merony case (9/56 Merony, [1958] ECR 11, as the first case in which ECJ referred on genuine institutional balance.

[9] *Ibid*, p. 384. Addendum in brackets is mine.

[10] See F. G. Jacobs, The Evolution of the European Legal Order, *CML Rev*., 41(2004) 303-316, at p. 310, 311.

[11] The ECJ case law evidences on some attempts from the EU to "enter" in EC competences, while in small cases was opposite. See ECJ Joined Cases C-317/04 and 318/04, *Parliament v Council* [2006] ECR I-4721 (*Passenger Name Record case*) where action is taken on the basis of the TEC, when the EC had not competence to do so.

is recognized in Art. 47 TEU, by wording: "…nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them." The control of respecting of this principle in EC is entrusted to the ECJ.

Having in mind those theses, the paper is divided into three parts. The topic of the first part is a short presentation of the nature of the EC and the EU and their competences. The second part is giving an analysis of the constitutional mixity between the community (EC) law and EU legal order. In the third part I am giving an inside look into the problem, presenting the case C-91/05.

1.2. Fuzzined nature of the EU and its competences

By the time that the Maastricht Agreement was created the EU as one diffuse and unclear organization was based on three pillars in the process of creating "an ever closer union among the peoples of Europe…" In that "process", the Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty.[12] With other words, the European Union was imagined as a roof structure with three pillars. The first pillar makes the European Communities, second, Common Foreign and Security policies (CFSP) and the third, Cooperation in Criminal and Judicial matters, which latter transformed in police and judicial cooperation in criminal matters (PJCC). Regarding its legal nature some authors considered the EU as a classic international organization or permanent intergovernmental conference, but others, as an association of states acting in common framework in order to achieve common objectives.[13] Although the theoretical consideration of this question falls out of the framework of this paper[14], it is important to keep in mind that from the qualifications of the EU also the character of the Union itself depends and the character of the relationships between the EU law and the Community law.

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[12] Art. 1, Para. 3, first sentence.

[13] See D. Curtin, I. Dekker, The EU as a "Layered" International Organization: Institutional Unity in Disguise, in: *The Evolution of EU Law* (ed. P. Craig, G. de Burca), Oxford 1999, pp. 83-136;

[14] We refer to D. Curtin, I. Dekker, *op. cit.*, pp. 83-136; C. W. Herrmann, Much Ado about Pluto? The "Unity of the Legal Order of the European Union" Revisited, *EUI Working Papers RSCAS* 2007/05, http://www.eui.eu/RSCAS/Publications/

Determination of the EU as a classical international organization can have as a consequence that the acts adopted under the second and third pillar are being described as agreement between the member States, i.e. as traditional public international law acts, not as secondary law of EC. It has, as consequences avoiding those supranational characteristics, such as supremacy, direct effect and judicial review from community law would be applied to the EU legal order. Only with the Amsterdam Treaty some of these obscurities could be clarified and it made also "crystal clear that the Union system is founded on the principle of the rule of law thus making this principle applicable to CFSP law."[15]

Leaving beside the broad discussion about the legal nature of the EU, it is clear that between the pillars there are differences in objectives and in the process of decision-making. While in first pillar the EC and its economic, social and, partially political objectives are settled, the second pillar was reserved for establishing and implementing common foreign and security policy (CFSP). As we said, in the first pillar the decision making process is mainly characterized by the majority voting or the qualified majority voting, while the second and third pillars are characterized by the intergovernmental method, based on consensus of all participants – member states, by using basically the instruments of classic international law: international agreements and resolutions, latter called joint positions and joint actions. In that sense there is an opinion that one of the aims of the introduction of the "pillar structure" in the Maastricht Agreement and in TEU, is the separation of these two decision-making processes: one in the EC and the other in the newly established EU.[16]

As regards of the scope and nature of competences, according the prevailing opinion[17] the EU enjoys external powers in second and third pillars[18], but opinions are divided about their nature and the constitutional structure.

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[15] G. Bono, Some Reflections on the CFSP Legal Order, *CML Rev.*, 43: 337-394, 2006. p. 347.

[16] See N. Lavranos, In dubio pro first pillar. Recent Developments in the delimitation of the competences of the EU and the EC, p. 312, available on http://www.elr.lu/archiv_pdf/Ausgabe_ 2008_nr09.pdf

[17] See, for example A. von Bogdandy, J. Bast, The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform, *CML Rev.*, 39(2002), p. 227-268.

[18] P. Craig, G. de Burca, *EU Law*, part 6 EU International Relations Law, Oxford University Press, 2007. p. 167. et. seq.

Some scholars consider that in CFSR there is not conferred competence, but see them as so called "newly created competences",[19] or as the replacement of national foreign politics, while in constitutional sense, there is opinion that the "EU foreign relations are regulated by norms arising from at least three different legal orders, including national, the international, and the EU legal order with its varied pillar structure.[20]

Furthermore, it means that the duties of the Member States and of the institutions of the EU are, in order to ensure that CFSP measures, adopted and implemented in accordance with the provision of the TEU. Problems arise due to the fact that the ECJ doesn't have jurisdiction over the matters of CFSP measures, it doesn't have the right to interpret them, except with regard to *acquis communautaire*. The responsibility for ensuring compliance of the CFSP measures with the EU Treaty is transferred to the political level of the EU and to the Member States. The lack of ECJ jurisdiction concerning the judicial review of the EU (CFSP) instruments represents the first confusion.

The *second* confusion arises from the fact that EU has its own objectives, but hasn't its own institutions independent from those of the EC. Although it is not clearly said, it can be concluded from Article 3 TEU: "The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*," that EU borrows institutions from EC. In that situations, according to Article 5 of TEU, "The European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors shall exercise their powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the other provisions of this Treaty." To be in situation to serve two masters ("Herren") is not easy and not without misunderstandings.

The *third*, main, cause of fuzziness lies in the fact that there is as established legal order or system of European Communities, composed from primary and secondary law, as a main parts, while the state of place of EU Law and

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[19] R. A. Wessel, The European Union's Foreign and Security Policy, A Legal Institutional Perspective, Kluwer Law International, The Hague 1999, p. 254.

[20] M. Krajewski, European Foreign Policy and Constitution, 2004, 23 *Yearbook of European Law* (*YBEL)*, p. 435.

CFSP as its inherent part are not clear. In regard to EC law, after some dissonant views, it is established, prevailing common opinion about community law as a special autonomy legal system which characterizes some *sui generis* principles as: direct application, direct effect, supremacy. The process of adopting these rules, their method of implementing and enforcing as well as jurisdiction of ECJ for their reviewing contributed to be EC treated as community based on rule of law.[21]

If we look at CFSP, as a quintessential of the second pillar, the question arises: does the CFSP create a new legal order of the EU? Only if the CFSP represents, alone or with the third pillar, parts of a new legal (EU) order it is possible to make a comparison between the two orders: EC and EU legal orders and speak about their constitutional mixity.

The concept of a legal order assumes "an objective presence of legal norms when relations between states are concerned."[22] For the second pillar the sources of these norms we can be found only in the TEU, within that is in corresponding competences of the EU or its institutions. However, the problem arises because the TEU laid down numerous objectives, before the EU did it itself, as for example in Art. 3 of the TEU, which charges the Union "in particular [to] ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies," but without providing the legal base for the EU to act in this matters. The existence and the choice of legal basis are of vital importance for the determination of the procedures by which instruments and measures may be adopted. The importance of choosing the correct legal base and the consequences of not doing so, were explained in the Opinion 2/00 in which the European Court of Justice held that the choice of the appropriate legal basis "has constitutional significance" because the Community has only conferred competences only. The ECJ highlights especially that it is so vitiate "where the Treaty does not confer on the community sufficient competence …, or where the appropriate legal basis for the measure concluding the agreement lays down a legislative procedure different from that which has in fact been followed by the Community institutions." [23] The ECJ also finds that in situations where a measure has more than one purpose, where one

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[21] Case 294/83, Parti écologiste "Les Verts" v European Parliament, [1986] ECR 1339.

[22] R. Wessel, *op. cit*., p. 319.

[23] Opinion 2/000 (Re Cartagena Protocol, [2001] ECR I-9713., para 5.

purpose is incidental and the other predominant, it should be based on a single legal basis rather than two. Where, however, the objectives were inseparably linked, more than one legal basis could be used.

There are also some obscurities in the sense of the so called *implied competences* of the EU to act in international relations (so called international legal personality). The EEC was in a similar situation, but the ECJ has dealt with this issue in the AETR case, while this is not a possibility in our case, because the ECJ was not given a direct jurisdiction over CFSP matters, except to control the delimitation of powers between the CFSP and EC, according to the Art. 47. TEU. That is also the reason why about the character and the nature of the EU competences in the Common Foreign and Security matters, the EU had to search for help in the regulations of the international law. From the perspective of international law, two factors are relevant for determining the status of the EU and its nature: the manner in which EU's objectives are worded in the TEU, and the behavior of the EU in practice.[24] Such way of thinking is necessary to accentuate, due to the fact that sometimes the TEU norms "simply create factual legal situations, which in turn shape the legal framework for the conduct of the actors involved in formulating and implementing CFSP,"[25] but in the TEU there are nowhere specific provisions to be found, similar to those in Article 281. of the TEC about the legal personality of the EU. On the other side, in contrast with the European Community, the transfer of competences on the EU level is "neither provided for nor required under present and future constitutional arrangements underlying the CFSP."[26] Therefore, some authors speak about "uncertain legal foundations of the Title V of the TEU"as a main cause of ambiguity and different understanding of unity of EU legal order.[27] Even if we can image the CFSP as a non purely "intergovernmental" form of international cooperation, but as a source of new kind of legal norms obliging member states of the EU, or as a new legal order in *statu nascendi*, for the title of this paper is important to analyze relationships between these two legal orders, as regarding to the

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[24] See Reparation for Injuries Suffered in the Service of the United Nations [1949] ICJ Rep. 174, 179-180.

[25] Ibid.

[26] D. Thym, Foreign Affairs, forthcoming in: *Principles of European Constitutional Law* (ed. Bogdandy, Bast), 2nd ed., Hart, 2009, p. 30.

[27] R. G. Bono, Some Reflections on the CFSP Legal Order, *CML Rev.*, 43: 337-394, 2006, p. 338, 339.

application of some principles from the community law (direct effect, superiority of community law under CFSP law, jurisdiction of ECJ to review CFSP instruments). Though, we can observe differences in opinions also in that field: one stream supports the convergence of the Union and the Community legal order, and the other sees parallelism between intergovernmental Union law and classical public international law.[28]

2. WHAT DOES MEAN MIXITY CONSTITUTIONALITY IN COMMUNITY LAW AND EU LAW

Putting aside numerous discourses and schools of thinking, relating to many faces of constitution and constitutionalism, from practical point of view, we understand the principle of constitutionality as a set of basic rules for governing the of vital relationships between member states or other constituents of the community (system basic governing rules) and for the protection of basic (fundamental) freedoms and rights. According to the G. de Burca, the formal constitution "corresponds to the foundational legal values which allocate and govern the exercise of power within the polity, while the real or substantive constitution relates more generally to the way in which political power is actually exercised, to the conventions and practices of the actors and institutions which exercise public power."[29] Concerning the meaning of constitutionalism or constitutionality it relates to "the extent to which a particular legal system does or does not possess the features associated with a constitution."[30]

Concerning the nature of the EEC/EC law and of the EC Treaty, ECJ has already showed his direction in the *Van Gend*[31] and the *Costa v ENEL*[32] cases and pointed out that there are some constitutional principles in the Community law, like direct application and direct effect, explaining that as

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[28] For the proponents of these opinions see D. Thym, *op. cit.*, p. 30, and authors in footnotes 176 and 177.

[29] G. de Burca, The Institutional Development of the EU: A Constitutional Analysis, in: P. Craig and G. de Burca, *The Evolution of EU Law*, Oxford, 1999, p. 61.

[30] P. Craig, Constitutions, Constitutionalism, and the European Union, *European Law Journal*, Vol. 7(2002), No 2, p. 127.

[31] Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1.

[32] Case 6/64 , *Flaminio Costa v. ENEL* [1964] ECR 585.

following: due to the nature and the spirit of the Treaty or based on the place in the Treaty where the provision is stated. Finally, the ECJ recognized the EEC Treaty as a constitutional charter, only in the 80-ies, in the case *Les Verts*.

Recognition of the EEC Treaty as a constitutional charter had as its consequences the duty of community subjects to act on advanced prescribed manner, according to the EC Treaty. This duty was mandatory for both, for the process of adopting as for the process of enforcement of the whole Community law (on their subjects). From the point of view of the member states, it meant that they were obliged to respect not only vertical conferred competences, but also horizontal allocation according to the EC Treaty. In this way, the ECJ recognized a paramount role to the EC Treaty, as a constitution, or Kelsen's basic norm (pranorm), or *Grundnorm,* or Hart's rule of ultimate rule of recognition, what had as consequences the qualifying of community law, based on a constitution or as a positive law based on constitutional principles. The constitutional character of Community law assumes further existence of the hierarchy or range between its norms in the vertical sense and the horizontal harmonization.

If we want to consider the problem of the relationship between community law and EU law, it is first of all necessary, to give an answer to the questions: does EU law exist and who makes it?

We start from the hypothesis that EU law makes instruments as a rule unanimously adopted (intergovernmental) from EC institutions, as EU's organs in the framework of the second and third pillars. Those instruments like framework decisions, joint actions and joint decisions can hardly be treated as a legal acts with normative power, which characterizes community law, but rather than as a part of international law, regarding their mode of adopting, and mode of enforcement and, especially, because the ECJ hasn't jurisdiction to review them. As regard to the legal nature of the CFSP provisions there are different opinions.[33] We consider that the CFSP provisions make a part of EU Law, while meeting only minimum requirements: they are compatible with each other and subordinated to a "Grundnorm", which forms part of the same legal system, and which resolves any incompatibility between the rules.[34] As regards the status and nature of EU, we accept the opinion that the EU constitutes a new *sui generis*

[33] See R. G. Bono, *op. cit.*, pp. 366-379.

[34] *Ibid*., p. 367.

international organization which exists parallel to the European Communities. Concerning the nature of EU law and its relations to Community law, we accept the position that the rules (from all three pillars)don't form a single legal system, but have common objectives and principles. Instead this one single legal system tree legal sub-systems coexist at the same time: Community law, the CFSP legal order and policy and Criminal Cooperation law.[35]. The reason for that is the fact that there are some features distinguishing Community law from CFSP legal order: community law has direct effect on individuals, primacy over national law, and judicial review from ECJ, what gives the Community law constitutional status in laws of Member States. On other side, "CFSP legal order constitutes a much less intrusive order of international law than Community law: it does not have the Community law principle of conferral of powers, it has not have the same working methods and procedures, parliamentary control is weak,"[36] what it makes to an "unfinished" and "evolutionary" trait.[37]

If we decide to follow the thesis that the EC law and the EU law coexist at the same time, even as subsystems, created by institutions following different means (the aims of the Member States or their nationals), we should follow also the understanding of constitutional mixity as a institutional balance between the EC and the EU, the so called cross-pillar balance. The goal of this balance is the preservation of the competences that were already confirmed to the European Community by the Member States and the obviation of the encroachment of competences of the EC (between the EU and EC.) That would have as its consequence the dereliction of the *acquis communautaire*, but also the endangering of the decision making way of the Community, because it would mean, that in all matters confirmed to the European Union in areas of CFSP or PJCC it would be possible to make decisions by consensus and that would be endangering the Community voting system. And in the end, it would mean also the change of the legal nature of the European Community from a *sui generis* supranational organization to a classical international organization.

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[35] U. Everling, Reflexions on the structure of the European Union, *CMLRev.*, 29(1992), 1053-1077, at p. 1063.

[36] G. Bono, *op. cit.*, p. 393.

[37] De Burca, The Institutional Development..., *op. cit.*, p. 55 et seq, at p. 67.

3. THE CASE: C - 91/05, ECOWAS

3.1. Background to the case

By its action brought under Article 230 EC Treaty, the Commission of the European Communities instituted proceeding against Council asking of the Court to annul Council Decision 2004/833/CFSP of 2 December 2004 implementing Joint Action 2002/589/CFSP with a view to a European Union contribution to Economic Community of West African States (ECOWAS) in the framework of the Moratorium on Small Arms and Light Weapons[38] ('the contested decision') and to declare it inapplicable, because of its illegality and to declare illegal and hence inapplicable the Joint Action, in particular Title II thereof.

Namely, the Council adopted the Joint Action 2002/589/CFSP of 12 July 2002 on the European Union's contribution to combating the destabilizing accumulation and spread of small arms and light weapons repealing former Joint Action 1999/34/CFSP[39] ('the contested Joint Action'). Mentioned Joint Action 2002/589/CFSP was adopted in accordance to the partnership agreement between the members of the African, Caribbean and Pacific Group of States, on the one side, and the European Community and its Member States, of the other part[40] (the Cotonou Agreement), form 23 June 2000 and was approved on the behalf of the Community by Council Decision 2003/159/EC of 19 December 2002.[41]

The objectives of the contested Joint Action were as the following:

"to combat, and contribute to ending, the destabilizing accumulation and spread of small arms, to contribute to the reduction of existing accumulations of these weapons and their ammunition to levels consistent with countries' legitimate security needs, and to help solve the problems caused by such accumulations."[42]

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[38] OJ 2004 L 359, p. 65.

[39] OJ 2002 L 191, p. 1.

[40] OJ 2000 L 317, p. 3.

[41] OJ 2003 L 65, p. 27.

[42] See Article 1(1).

As regard to other elements important to the Commission, we are stating Title II of the contested Joint Action, headed "Contribution by the Union to specific actions", in which have provided financial and technical assistance to programs and projects which make a direct and identifiable contribution to the principles and measures referred to in Title I. Further, in Article 9(1) in Title II was stated: "The Council and the Commission shall be responsible for ensuring the consistency of the Union's activities in the field of small arms, in particular with regard to its development policies…"

In order to implement the contested Joint Action and with a view to a European Union contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons, the Council adopted on 2 December 2004, the contested action, on the bases Article 3 of Joint Action and Article 23(2) TEU.

By Article 3 of the contested decision, the Commission was entrusted with the financial implementation of this Decision and, in that sense should have concluded financial agreements with ECOWAS. Finally, by Article 4(2) of the contested decision, the Commission was charged to submit regular reports on the consistency of the European Union's activities in the field of small arms and light weapons, in particular with regard to its development policies.

When the contested decision was adopted, the Commission made two "reserves": on its legality stating that "this Joint Action should not have been adopted and the project ought to have been financed from 9th (European Development Fund – EDF) under Cotonou Agreement, and that Joint Action falls within the shared competences on which Community development policy and the Cotonou Agreement are based. Such areas of shared competences are just as much protected by Article 47 TEU as areas of exclusive Community competence.

3.2. Legal issues

In the procedural sense the basic question looking for a straight answer was the question of admissibility of the application for annulment of the contested decision, admissibility of the plea of illegality of the contested Joint Action and jurisdiction of the ECJ.

In the substantial sense the main issue was the interpretation of Art. 47 of TEU: "Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel Community

and the Treaty establishing the European Atomic Energy Community, and to these final provisions, nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them."

So the task given to the ECJ was not only to interpret Art. 47 TEU in a way that it would provide a final solution to the reorganization of the competences inside of the EU organs, but also the difficult task to define division of competences between EC and EU.[43]

3.3. Observations of the parties

In regard to the admissibility of the application for annulment, the Council and interveners have not argued to the contrary.

As regard to admissibility arguments, the opinions of the parties were opposed. The Council and governments of UK and Spain considered the Commission's plea of illegality as inadmissible for two reasons: the ECJ *has no jurisdiction* to rule on the legality of measure under the CFSP and, secondly, the Commission as the privileged applicant is barred from pleading the illegality of an act, because the annulment of that act, it could have sought directly by an action under Article 230 TEC.

The Commission rebutted these objections and considered that plea of illegality raised only in light of Article 47 TEU – for the same reasons as those on which its principal application for the annulment of the contested decision is based, and that privileged applicants have the right to plead the illegality of a legislative act where such illegality is revealed fully when the act is actually applied, after the expiry of the period laid down by the fifth paragraph of Article 230 TEC for bringing an action for annulment of that act.

Regarding the legal interests in the material sense, the Commission as the applicant considered oneself "invited" and responsible to institute this proceeding, having in mind Articles 3 TEU, which entrusts the Council and the Commission with the duty of cooperation in order to "ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies." The Commission

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[43] For this aspect see M. Cremona, A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty, *EUI Working Papers*, Law, No 2006/30.

considered that the Council, by adopting the contested decision, has encroached upon Community competences and, therefore, infringed Article 47 TEU.[44] As concerning matter of dispute, the Commission observed that objective of combating the proliferation of small arms fell firmly under Community competence within the framework of its development co-operation policy, and ought to adopt under and on the basis EC Treaty.

The United Kingdom presented a very interesting statement, claiming: "In order to regard a measure based on the EU Treaty as contrary to Article 47 EU, it is necessary, first, that the Community be competent to adopt a measure having the same purpose and the same content. Second, the measure based on the EU Treaty must encroach on a competence conferred upon the Community by preventing or limiting the exercise of that competence, thus creating a pre-emptive effect on Community competence. Such an effect is however impossible in an area such as development cooperation, where the Community has concurrent competences."[45] On other side, the Council and the United Kingdom Government added that, "were an incidental effect on the objectives of a Community competence sufficient to bring the matter under that competence, there would no longer be any limits to the scope of Community competences, thus undermining the principle of conferred competences." [46]

3.4. Opinion of the AG

3.4.1. Issue of admissibility or jurisdiction of ECJ

Due to the fact that the Council didn't not reproach the admissibility of the complain for annulment and rose directly the question of the ECJ jurisdiction, this question became subject threw the interpretation issue of Art. 241 TEC. The wording of Article 241 TEC is as follows: "Notwithstanding the expiry of the period laid down in the fifth paragraph of Article 230, any party may, in proceedings in which a regulation adopted jointly by the In order to regard a measure based on the EU Treaty as contrary to Article 47 EU, it is necessary, first, that the Community be competent to adopt a measure having the same purpose and the same content. Second, the measure based on the EU Treaty

[44] See para. 29. of the Judgment.

[45] See para. 44 of the Judgment.

[46] Para 48.

must encroach on a competence conferred upon the Community by preventing or limiting the exercise of that competence, thus creating a pre-emptive effect on Community competence. Such an effect is however impossible in an area such as development cooperation, where the Community has concurrent competences."[47] On other side, the Council and the United Kingdom Government added that, "were an incidental effect on the objectives of a Community competence sufficient to bring the matter under that competence, there would no longer be any limits to the scope of Community competences, thus undermining the principle of In regard admissibility of the plea of illegality of the contested joint action, the Council and some interveners considered that Court has no jurisdiction to rule on the legality of a measure falling within the CFSP due to the reasons mentioned already (because CFSP measures don't fulfill the requirements of Article 230 (2) TEC and because the plea was introduced by the so called privileged applicant).

In his very detailed opinion AG Mengozzi considered that: "Although the contested decision, based on Article 23 EU and on the contested Joint Action adopted pursuant to Title V of the EU Treaty, is not, in principle, subject to judicial review under Article 230 EC it must observed that, in accordance with Article 46(f) EU, the provisions of the EC Treaty concerning the powers of the Court of Justice and the exercise of those powers are applicable to Article 47 EU, which provides that *nothing in the EU Treaty shall affect the EC Treaty*."[48]

"Following the example of what has been inferred from Articles 46(f) and 47 EU with regard to the judicial review of acts of the Council adopted on the basis of the present Title VI of the EU Treaty (the third pillar), it is therefore the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title V of the EU Treaty do not encroach on the powers conferred by the EC Treaty on the Community."[49]

By making parallel between the second and the third pillar cases, and by calling on Article 46(f) in order to find the basis for competence of the Court

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[47] See para. 44 of the Judgment.

[48] Para. 30 of the Opinion.

[49] Para 31. of the Opinion. See also Case C-170/96 *Commission v Council* [1998] ECR I-2763, paragraph 16, and Case C-176/03 *Commission v Council* [2005] ECR I-7879, paragraph 39.

of Justice for application of Article 47 TEU, AG Mengozzi gave acceptable substantive and procedural arguments for jurisdiction of the ECJ.

Our comment. On jurisdiction of the ECJ we can speak and in material sense, starting from the fact that the Court is, according to Article 46(1) TEU, charged to ensure that "nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them."

In material sense the wording "nothing in this Treaty" we can image as cover all measures, without its legal nature with meaning that no provision of EC Treaty can be affected by a provision of EU Treaty. In other words, decisive role haven't content and legal nature of measures, but its *effect* on EC Treaty, that is on *acquis communautaire*. Behind these truly meaning there are practical aims. According to the Commission, Article 47 TEU aims to protect the Community's competences against the activity of the European Union based on the EU Treaty by "establishing fixed boundary between the competences of the Community and those of the European Union."[50] In that context very interesting argument raised the UK as intervener arguing that Article 47 TEU could only be infringed in cases of existing of exclusive competences on side EC,[51] but we will refer to this matter later in the paper.

In procedural sense, jurisdiction of the Court in this case AG explained in Para. 57 on following way: "As the provisions of the EC Treaty relating to the Court's jurisdiction and its exercise, of which Article 241 certainly forms part, apply to Article 47 EU, the Court may be required to ascertain whether a joint action of the Council adopted by virtue of Article V of the EU Treaty, which forms the basis of the decision which is the subject of the action, is inapplicable in so far as the Council, by adopting the joint action, encroached on the competences conferred on the Community by the EC Treaty."

3.4.2 Issue of EU competences

The second set of raised questions related on the existing of competences of the EC and EU, their content, legal nature and mode of exercising.

First of all, the applicants considered that contested decision impinges upon competences conferred upon the Community in area of development

[50] See Para. 76 AG Mengozzi opinion.

[51] See Para. 44 and 48 of the Judgment.

cooperation, thus infringing Article 47 EU.[52] As regard of relations between EC and EU, the Commission and the Parliament take a view that Article 47 establishes a "fixed" boundary between the competences and those of the Union. In regard of kind of competences, they stated that development cooperation policy represent area of shared competences in which "the Member States retain the competence to act by themselves, whether individually or collectively, to the extent that the Community has not yet exercised its competence, the same cannot be said for the Union ….'[53] In regard its objectives and content, according the Commission, the contested decision falls within the scope of Community competences and could therefore properly have been adopted on the basis of the EC Treaty.[54]

The position of other side was contrary. With regard aims, the Council considered that these provisions aims to protest the balance of powers established by the Treaties and cannot be interpreted as aiming to protect the competences conferred upon the Community to the detriment of those enjoyed by the Union.

AG Mengozzi considered that the nature of competence given to the Community and the distribution of competences between it and the Member Stets are immaterial for the purpose of applying Article 47, provided that competence exists.[55] In regard nature of competences of EC and EU AG considered that "the distribution of spheres of competences between the Community and the Member States must be distinguished from the distribution of spheres competence governed by Article 47 EU between the Community and the European Union, acting in the framework of the second and third pillars."[56] As regard the scope of wording "nothing" in the TEU "shall affect" the EC Treaty, AG considered that it could not be read in isolation, but must be interpreted in the light of the common and final provisions of that Treaty in order to "ensures overall coherence of the provisions of the EU Treaty."[57] In the final, AG considers that "the

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[52] Para. 35 of the Judgment.

[53] *Ibid*., para. 36.

[54] *Ibid*., para. 40.

[55] *Para* 100.

[56] *Para* 110.

[57] *Para* 122.

interpretation of the scope of Article 47 EU cannot be a function of the distribution of competences between the Community and Member States by virtue of the EC Treaty."[58] .

3.5. Finding of the ECJ

In the reasoning to its decision the ECJ was starting from the point that the "... Article 47 EU aims, in accordance with the fifth indent of Article 2 EU and the first paragraph of Article 3 EU, to maintain and build on the *acquis communautaire*."[59] In regard to measure having legal effect adopted under Title V of the EU Treaty, it is apparent from case law of the Court that measure " affects the provisions of the EC Treaty within the meaning of Article 47 EU whenever it could have been adopted on the basis of the EC Treaty, it being unnecessary to examine whether the measure prevents or limits the exercise by the Community of its competences,"[60] and it is of no importance what kind or nature of competence it is, but just its very existence is considered to be enough..[61]

In consideration of the choice of a legal base in the situation "a measure reveals that it pursues a twofold aim or that it has a twofold component and if one of those is identifiable as the main one, whereas the other is merely incidental, the measure must be based on a single legal basis, namely that required by the main aim or component."[62] Starting from that the Court found: "since the measure falling within the CFSP which the contested decision is intended to implement does not exclude the possibility that its objectives can be achieved by measures adopted by the Community on the basis of its competences in the field of development cooperation, it is necessary to examine whether the contested decision, as such, must be regarded as a measure which pursues objectives falling within Community development cooperation policy."[63] On this ground the Court annulled Council Decision in question.

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[58] Para 127.

[59] Para 59 of the Judgment.

[60] Para 60 of the Judgment.

[61] See para 62.

[62] Para 73.

[63] Para 92.

4. CONCLUSION

This case and cases mentioned in this analyses show that development of the European Union from Maastricht to Nice and Lisbon Treaty, gradually upgrading of decision-making in second pillar and CFSP including the use of QMV, the possibility of constructive abstention and enhanced cooperation what resulted in blurring borders between two pillars. But, "this does not mean that all differences between the Community and the other pillars have disappeared and that by now 'Union law' can be equated with Community law.[64] We consider this conclusion acceptable with following arguments.

The European Court of Justice recognized the constitutional character only to the EC Treaty, but not yet to the Treaty on European Union.[65] Except that, the ECJ has developed a system of judicial review over all decision-making processes and application of all legally binding community law acts (except Founding Treaties) and on this way made community law itself as constitutional. On other side, by accepting the special principles like: principle of direct application, direct effect and primacy of community law over national law, the Member States recognized their constitutional force in their own national legal systems.

In that sense it is possible to speak about constitutionality in and outside of a state and that means also on the level of the European Community.

Nevertheless, when we are discussing the EU law, we have seen in this case that the EU law doesn't dispose with specific legislative competences to create legal acts with normative powers (legislative acts), but it disposes only with legal instruments. Although these instruments, like joint strategies, joint actions and decisions are binding for their addressees, they are binding only based on intergovernmental agreements and not on normative powers.

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[64] R. Wessel, The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation, *European Constitutional Law Review, 5: 117–142, 200,* p. 141., available on http://journals.cambridge.org/download.php?file=%2FECL%2FECL5_01%2FS1574019609001175a.pdf&code=cde3edc5e0cad7840e528452fc6608c7

[65] But, in cases Yusuf and Kadi, (Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, Case Case T-315/01, Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities), the Court of First Instance confirmed "the constitutional architecture of the pillars" considering that EU and Community law coexist "as integrated but separate legal orders", para. 156 Yusuf case.

Therefore, the question stays: Is it possible for the acts of the EU to get normative power if they are seen together with the law of the European Community?

In the case C-91/05 the ECJ by accepting the competence for judicial review, regardless the fact that it came to it threw the indirect interpretation (having in mind the protection of the *acquis communautaire* by the instruments of the CFSP threw encroachment), the ECJ demonstrated this integration or bound between these two systems, but these were not the only conclusions of this case. The consideration of the concept of legality of the contested decision under the criteria from community law, particularly regarding the meaning of the concept competences and manners of their exercise, ECJ expanded the area of the application of the principles of the EC to the EU law, which means also to the instruments of the CFSP area. That was a means to achieve the constitutionalisation as the process of providing constitutional character to specific legal acts continued and developed also in the field outside of the Community, started to be applied also to acts adopted under Title V of the TEU and also the EU law as a separate legal order. So, the process of constitutionalisation is not stopped, but given into the hands of the ECJ.

There are many practical consequences due to this process, in the political and legal field and concern mostly the relation between the Member States and the EC and the EU as well, as the future of the idea of the EU.

If we look at the hierarchical relation between the community law and EU legal instruments in the CFSP measures, the ECJ, has confirmed the thesis about the coexistence of two legal subsystems. But, looking at the relation between the Member States and the EU regarding the principle of preemption that is used when we are talking about exercising of competences between the Member States and the EC, the ECJ didn't confirm the same to the EU. The reason for that is, that the "EU, does not enjoy the same complementary competence, (but) must respect the competences of the Community, whether exclusive or not, even if they have not been exercised."[66]

5. FUTURE

Although the Treaty of Lisbon introduces numerous clarifications and simplifications, SFSP and CSDP are not made a matter of the Community.

[66] See position of Commission, Para 36 of the Judgment

That means that the SFCP will also after the Reform Treaty (if it comes to that) comes into force, remain a subject to stricter rules of coordination and cooperation between Member States and the pillars of foreign action basically remain within the national competence and without judicial review of the its measures taken from ECJ.[67] Nevertheless, the actual praxis of the ECJ shows us that there is a "clear trend towards the integrations of those policies falling under the TEC and these falling under the TEU."[68] Such a process of "cross-pillarization" which resembles an increased interconnectivity between different EC external policies "makes the choice of a correct legal basis, consistently treated as a 'constitutional question' by the ECJ, increasingly troublesome."[69]

Jelena Vukadinović*

Ustavna pomešanost prava EZ i prava EU

Rezime

U radu je analizirano ustavno preklapanje i pomešanost nadležnosti kojima su nakon sporazuma iz Mastrihta do stupanja na snagu Lisabonskog sporazuma raspolagale EZ i EU. Nejasna ili maglovita linija podele nadležnosti često je u praksi dovodila do sporova između organa EZ i EU što je kvalifikovano i kao potkradanje nadležnosti od strane EU, naročito kod regulisanja pojedinih pitanja iz zajedničke spoljne i bezbednosne politike (drugi strub) i sudske saradnje u krivičnim predmetima (treći stub). Stoga se pred Sudom pravde kao jedno od osnovnih, postavilo pitanje jasnog razgraničenja pomenutih nadležnosti radi očuvanja i zadržavanja postignutih

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[67] I. Pernice, Introduction Multilevel Constitutionalism in Action, p. 17.

[68] See M. Cremona, External relations of the EU and the Member States: Competence, Mixed Agreements, International responsibility, and Effects if International Law, *EUI Working Paper* LAW No. 2006/22, pp. 9 et seq.

[69] C. W. Hermann, *op. cit*., p. 6.

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komunitarnih tekovina (acquis communautaire). O stavu Suda autor pše komentarišući njegovu odluku u predmetu ECOWAS.

Ključne reči: EZ, EU, ustavna načela, spoljne nadležnosti, pomešanost, razgraničenje, komunitarne tekovine.

Key words: EC, EU, constitutional principles, external competences, constitutional mixity, delimitation, acquis communautaire.

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THE EFFECT OF THE EUROPEAN COMMUNITIES ACT 1972 AND THE HUMAN RIGHTS ACT 1998 ON THE UK'S CONSTITUTIONAL ORDER CONSIDERING THE PRINCIPLE OF PARLIAMENTARY SOVEREIGNTY[1]

Abstract

In this paper, author discusses the challenging of British constitutional doctrine in respect of two statutes: the European Community Act 1972 (ECA 1972) and the Human Rights Act 1998 (HRA 1998). Both statutes subject the UK Parliament to a supra-national controlling mechanism. The European Convention of Human Rights (ECHR) is interpreted by the European Court of Human Rights (ECtHR) European Treaties are interpreted by the European Court of Justice (ECJ). The main task of this essay is to examine the effects of these statutes on the UK's constitutional order in order to determine the limitations of sovereignty of UK Parliament.

***Key words**: European Community Act 1972; Human Rights Act 1998; UK Parliament; Constitutional Order; Principle of Parliamentary Sovereignty.*

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[1] This paper is done as the research paper for Constitutional Law and European Law subjects in my law studies at University of London.

1. INTRODUCTION

The UK does not have a written constitution. Instead, the central point of British constitutionalism is the sovereign parliament. According to the "orthodox"[2], Diceyian, constitutional theory Parliament can legislate on whatever it wants, no court can question the validity of its laws and it cannot bind itself for the future[3]. The essay will discuss the challenging of British constitutional doctrine in respect of two statutes: the European Community Act 1972 (ECA 1972) and the Human Rights Act 1998 (HRA 1998).

Both statutes subject the UK Parliament to a supra-national controlling mechanism. The European Convention of Human Rights (ECHR) is interpreted by the European Court of Human Rights (ECtHR). European Treaties are interpreted by the European Court of Justice (ECJ). ECA 1972 and HRA 1998 have introduced these international documents into the domestic legal system. Possible clashes may therefore occur: post-ECA and HRA legislation may be contrary to the international documents. *Prima facie*, according to "orthodox" constitutional theory there is no problem: parliament is sovereign and can legislate on anything it wants with the effect of the later statute prevailing. However, based on the development of case law post-ECA and HRA, this essay will argue differently, emphasising two main points.

First, while both statutes have changed "orthodox", Dicey's constitutional order, the legal and constitutional, consequences of the two Acts are different. ECJ decisions in the UK are fully legally protected, perhaps because they concern mainly economic rather than human rights. In the case of the ECHR, while the ECtHR can award damages and ultimately expel the country from the Council of Europe, there is no legal way to introduce Strasbourg's court decisions into the domestic legal system. That depends on the public and on the political power of the court in Strasbourg.

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[2] It is referred to as "orthodox" partly because it does not fully correspond with either political or legal reality. First, it would be politically impossible for certain measures to be enacted by parliament despite its powers. Second, Parliament has traditionally managed to bind its successors.

[3] "If there is a clash between a later and an earlier norm then the later is taken to be impliedly repealed or disapplied by the former" See: P. Craig, G. Búrca, *EU Law, Text, Cases, and Materials*, 4th edition, Oxford University Press, 2008, p. 365. Compare for definition: A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edition, Macmilan, London, 1959, p. 39-94 (taken from: A. L. Young, Hunting Sovereignty: Jackson v Her Majesty's Attorney-General, Case Comment, *Public Law*, 2006, p. 187.).

Second, the essay shows that probably the most important constitutional impact is the new constitutional role courts gained. In implementing the two Acts courts have become the readers and prophets of the particular political reality, especially in the case of the ECA. The political significance of the ECA had been used to award the courts not only with new interpretation techniques[4], but also with the new functions of protecting the Parliament from any (past or future) unwanted contra-EC legislation and guarding the citizens' European rights. Unlike the HRA, where the court can only go as far as to issue a Declaration of Incompatibility and therefore produce public pressure on the Parliament, in the case of the ECA the courts can literally put the words in the mouth of Parliament.

2. EUROPEAN COMMUNITY ACT 1972 ISSUES

The question of whether the sovereignty of the UK parliament is jeopardized has been debated since the UK joined the EU (then the EEC) in 1973. The main cause of worry was EC law supremacy over the national legal systems in Member States. EC law supremacy took place as the result of ECJ activity in two cases: *van Gend en Loos*[5] and *Costa*[6] and was fully established among Member States nearly a decade before the UK joined the Union.

Briefly, *Van Gend*[7] ruled that a Treaty provision will be enforced even if there is conflicting national legislation. Individuals were granted the right to enjoy EEC law rights before their national courts, and national courts were deemed to be the most important instrument for the effective application of community law[8]. The principle of direct effect made inevitable the development of the doctrine of supremacy, which was subsequently defined clearly in the *Costa*[9] case.

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[4] The ECA requires courts to interpret laws in accordance with the Act.

[5] Case 26/62 [1963] ECR 13.

[6] Case 6/64 [1964] ECR 585.

[7] Case 26/62 [1963] ECR 13.

[8] F. G. Jacobs, The State of International Economic Law: re-thinking Sovereignty in Europe, *Journal of International Economic Law* 2008, p. 9-11. For more detailed discussion see: P. Craig, G. Búrca, *op. cit.*, p. 272-275.

[9] Case 6/64 [1964] ECR 585.

Costa[10] ruled that the EEC Treaty has created its own legal system which, on entry into force, became an integral part of the legal systems of the Member States which their courts are bound to apply[11]. The Community's legal powers are born out of a limitation of sovereignty or a transfer of powers from the States to the Community. The ECJ in *Costa*[12] ruled that Member States have limited their sovereign rights, and created a body of law that binds both their nationals and themselves[13]. So, these were the facts established by the ECJ and accepted by Member States long before the UK joined the EC. It is, therefore, not surprising that serious questions about parliamentary sovereignty were raised before the UK joined the EC[14].

After joining the Community, the UK passed the ECA in order to make way for Community legislation to enter into the domestic legal system. The ECA in s2 (4) states that "any enactment, *passed or to be passed*, …shall be construed and have effect subject to directly effective EU laws". As the case law suggests, courts took the view that wording from s2(4) "*passed or to be passed*" meant that all Acts, most importantly including those inconsistent with, but passed after, ECA, would not have domestic legal effect[15].

The first UK case that tested the ECA was *Macarthys v Smith*[16]. The question was whether the Sex Discrimination Act 1975 (SDA) as the later Act would prevail over the ECA (in accordance with Dicey "orthodox" constitutional theory) or would the British court follow the ECJ ruling in *Costa*[17] and accept

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[10] Case 6/64 [1964] ECR 585.

[11] See the ECJ ruling in the *Costa* case 6/64 [1964] ECR 585.

[12] Case 6/64 [1964] ECR 585.

[13] Costa case 6/64 [1964] ECR 585. Further on, in the *Internationale Handelsgesellschafg mbH* case 11/70 [1970] ECR 1125, the ECJ ruled as irrelevant the legal status of the conflicting national law. This case led to a serious conflict between the German Constitutional Court and the ECJ.

[14] The political debate continued after the UK joined the EC. It culminated in 1975 when a Referendum about EC membership was held. The turnout was 65%. Nearly 68% voted for EC membership and 32% against it. Parliament and Government were not legally obliged to respond to the referendum result, but the political consequences of not doing so would have been unthinkable.

[15] See I. Loveland, *Constitutional Law, Administrative Law and Human Rights, A Critical Introduction*, 4th edition, Oxford University Press, 2006, p. 445.

[16] *Macarthys v Smith* [1979] 3 ALL ER 325, CA.

[17] Case 6/64 [1964] ECR 585.

the precedence of EC law?[18] Lord Denning gave a judgment which stated that in EEC matters, the doctrine of implied repeal will not have effect because any law inconsistent with EEC obligations could not have been Parliament's intention but was caused by error in language used[19].

The next case was *Garland v British Rail*[20] in which the same question arose: conflict between SDA 1975 and ECA 1972. Lord Diplock followed Lord Denning's conclusion: EEC law prevailed. However, his reasoning was different. Lord Diplock did not go into Parliament's intentions as Lord Denning did; instead he emphasised that the ECA had introduced a new interpretation rule which obliged courts to read all domestic legislation with respect to EEC obligations[21]. Both judgments, however, found that domestic law inconsistent with EEC obligations would be applied only if given in "express positive terms"[22].

Such terms were used in the Merchant Shipping Act 1988 (MSA). In *Factorame*[23] the court considered the ultimate test: not only that the MSA was a later statute but also that it was unambiguous about the goals which it intended to achieve, which were inconsistent with directly effective EC law. The House of Lords decided to ask the ECJ whether interim relief could be granted to Spanish trawler-owners who claimed that the MSA violated Community law and that they would suffer irreparable damage if they had to obey English law. The House of Lords, following the ECJ's principle of full effectiveness of Community law, took the unprecedented step of restraining the Secretary of State from obeying the MSA[24].

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[18] For discussion see: I. Loveland, *op. cit.*, p. 456-457. Also: T. R. S. Allan, Parliamentary Sovereignty: Lord Denning's dexterous revolution, *Oxford Journal of Legal Studies (OJLS)* 1983, p.22-33.

[19] Ibid. Also: Lord Denning judgment in: *Macarthys v Smith* [1979] 3 ALL ER 325, CA.

[20] Garland v British Rail Engineering Ltd [1983] 2 AC 751.

[21] See Lord Diplock judgment in *Garland v British Rail Engineering Ltd* [1983] 2 AC 751. For detailed comment on the judgment: I. Loveland, *op. cit.*, p. 458.

[22] *Ibid*.

[23] *R v. Secretary of State for Transport*, ex p. Factorame Ltd [1990] 2 A.C. 85

[24] In fairness, it is important to add that the Queen's Bench Divisional Court immediately understood both the importance and the significance of the ECA 1972 and had proposed what had in the end turned out to be the right decision, that is, to send the question to Luxembourg. However, it was only after the appeal process that the question was actually

After *Factorame*[25] the constitutional order was changed and a new view on judges' position in the constitutional framework arose. What was the source which allowed judges such power as to effectively change the Parliament's will, for example as expressed in MSA 1988? One answer would be to point to judges' political attitude for EU integration. Another view is that it was judges' belief that Parliament had chosen to join the EU, a supra-national entity, understanding all legal consequences, and that this would be of the highest importance in reaching the decision[26]. The latter was the reasoning Lord Bridge gave in his judgment in *Factorame*[27] in which he stated that EC membership had posed limitations on sovereignty of which Parliament in 1972 was fully aware[28]. Therefore, Lord Bridge argued that the new constitutional order, which limited Parliament's sovereignty, was born from the fact of British membership in the EC and was purely underlined by passing the ECA in 1972. The final point in Lord Bridge's judgment in *Factorame*[29] is that the presumption that an Act of Parliament is compatible with Community law unless and until held to be incompatible must be at least as strong as the presumption that delegated legislation is valid unless and until declared invalid, as the House of Lords held in *Hoffmann-la Roche & Co. A.G. v. Secretary of State for Trade Industry*[30].

But how did the ECA get "entrenched", that is, safe from amendment and repeal of future Parliament?[31] And if it was possible with ECA, would it be possible with other statutes? Professor Wade finds that the new doctrine "makes sovereignty a freely adjustable commodity whenever Parliament

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sent to Luxembourg where the principle of absolute effectiveness of Community law was spelled out.

[25] *R v. Secretary of State for Transport*, ex p. Factorame Ltd [1990] 2 A.C. 85.

[26] T. R. S. Allan, Parliamentary Sovereignty: Law, Politics and Revolution, *Law Quarterly Review* 1997, p. 445.

[27] *R v. Secretary of State for Transport*, ex p. Factorame Ltd [1990] 2 A.C. 85

[28] See Lord Bridge's judgment in: *Factorame Ltd v Secretary of State for Transport* [1991] ALL ER 70.

[29] *R v. Secretary of State for Transport*, ex p. Factorame Ltd [1990] 2 A.C. 85

[30] [1975] A.C. 295. See: Lord Bridge judgment in: *Factorame Ltd v Secretary of State for Transport* [1991] ALL ER 70.

[31] Definition of "entrenched" legislation found in Ian Loveland, *op.cit.*, p. 37.

chooses to accept some limitations"[32]. In other words, entrenchment is easily achieved, no referendums or special procedures are needed, and it is possible whenever Parliament uses language which expressly means "entrenchment". Professor Loveland, on the other hand, is of the opinion that the final authority for entrenchment is with the courts, and that "sovereignty is freely adjustable commodity whenever the *courts* choose to impose some limitations"[33].

Somewhat more radical views are put forward by Professor Allan, who argues that courts are permitted to disapply the legislation if it finds it undemocratic, and that, therefore, the decision in *Factorame*[34] takes into account two different constitutional implications: one for democracy, and one concerning legal certainty[35]. According to him, even though legal certainty favored the ECJ decision, full exclusion of any deliberate breach of EC law would be undemocratic[36]. A similar argument is given by Professor Craig who looks at the historical background of parliamentary sovereignty and finds its root in the original 1688 need for Parliament to represent the national interest, which is unlikely to stand in modern days when Parliament is more seen as the promoter of political party interests[37]. Craig further argues that the EC Treaty has itself higher democratic capital than MSA 1988 and that, therefore, the Treaty can be seen as a "higher" form of law[38].

The finally chapter on "entrenching" the ECA was given in *Thoburn v. Sunderland*[39]. Four greengrocers and a fishmonger tried to challenge the UK's implementation of European Metrication Directives. The constitutional significance of *Thoburn*[40] goes beyond the question of EC law supremacy,

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[32] H. R. W. Wade, Sovereignty-revolution or evolution, *Law Quarterly Review* 1996, p. 568-575 (as found in: I. Loveland, *op. cit*., p. 483).

[33] I. Loveland, *op. cit.,* p. 484.

[34] *R v. Secretary of State for Transport*, ex p. Factorame Ltd [1990] 2 A.C. 85

[35] T. R. S. Allan (1997), p. 446.

[36] *Ibid*.

[37] P. Craig, Sovereignty of the United Kingdom after Factorame, *Yearbook of European Law*, p. 221-255 (as found in: I. Loveland, *op. cit*., p. 485-486).

[38] *Ibid*.

[39] *Thoburn v. Sunderland DC* [2002] EWHC 195; [2002] 3 W.L.R. 247.

[40] *Ibid*.

because the ECA, among some other Acts, was given "constitutional", "special" status. In his judgment in *Thoburn*[41] Laws L.J. argues that the ECA has a special status in British law protecting it from being implicitly repealed, because there are two categories of Acts of Parliament, "ordinary" and "constitutional", the latter ensuring constitutional rights and which can be repealed not by implication but only by "unambiguous words on the face of the later statute"[42]. Therefore, in common with all other EU members, the UK is developing a set of rules that can be "entrenched" in the same way as constitutions in other member countries are.

3. HUMAN RIGHTS ACT 1998 ISSUES

The European Convention on Human Rights (ECHR) is the work of the Council of Europe, a body established soon after World War II ended, and it therefore pre-dates the EC. The Convention came into force in 1953. Individuals were empowered with the right to take states before the European Court of Human Rights (ECtHR). If found in repeated breach of Convention rights, a state could be suspended or eventually expelled from the Council[43]. The British government gave individuals the right to petition under the Convention in 1965[44].

Before the HRA was passed UK courts did not have mechanisms to implement rights from the Convention, but they were able to use it as an aid in statutory interpretation[45]. In 1975, as the number of British cases brought before the ECHR rose and as EC law was directly applied, domestic judges became more aware of the Convention[46]. The HRA incorporated the

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[41] *Ibid*.

[42] *Ibid*.

[43] That was the case with Greece between 1967-1970. Obligations imposed on the state are in the realm of international law. The ECtHR would require from the Party in breach to bring domestic law in line with the Convention, to compensate victims, or take other steps required by the ECtHR. See: D. Feldman, *Civil Liberties and Human Rights in England and Wales,* 2nd edition, Oxford University Press, 2002, p. 49.

[44] H. Barnet, *Constitutional and Administrative Law*, 6th edition, Cavendish, London, 2006, p. 492.

[45]However, Murray Hunt's analysis found that in the first two decades of the convention's existence (1953-1973) the document was only once cited in domestic courts, probably due to the impression that UK law was protecting human rights as much as the Convention. See: M. Hunt, *Using Human Rights Law in English Courts*, Oxford Hart Publishing, 1997, p. 131 (as found in: I. Loveland, *op. cit.,* p. 668).

[46] *Ibid*.

Convention in domestic law. Conventional rights have vertical effect (against public authorities) and, more interestingly, horizontal effect (against private parties, as in *Douglas v Hello*[47] and *Campbell v MGN*.[48])[49]. In *Venables*[50] the court recognised the "right to privacy"[51], which did not exist in English common law[52].

The HRA brought fears for parliamentary sovereignty[53]. However, compared to the ECA (discussed above), the HRA was much less powerful. The HRA "provides a new basis for judicial interpretation of all legislation, not a basis for striking down any part of it"[54]. Courts can issue a Declaration of Incompatibility with Convention rights, but it will be up to Parliament to amend legislation. A Declaration of Incompatibility can have two effects[55]. Assuming the Government's positive attitude towards the Convention, the Declaration will alert to unintended breaches, or if the assumption is that the Government is trying to condone a breach of the Convention, the Declaration will serve to put ministers under public pressure.

One of the ways in which the HRA affected the role of the courts was that it gave courts instructions on how to do interpretation. Judgments of the ECtHR have to be taken into account, but they are not binding for domestic judges[56]. For example, in *Leeds*[57] the Court of Appeal concluded that judgments of ECtHR and House of Lords were inconsistent and that the

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[47] [2001] QB 967 CA. For the comment see: I. Loveland, *op.cit*., p. 756-757.

[48] [2001]

[49] H. Barnet,. *op.cit*., p. 519. See also: I. Loveland, *op.cit*., p. 721 and p.724-729.

[50] *Venables v News Group Newspapers Ltd* [2001] 1 ALL ER 908.

[51] Article 8 of the Convention.

[52] In *Kaye v Robertson* [1991] Glidewell LJ said: "It is well known that in English Law there is no right to privacy" as quoted from: H. Barnet, *op. cit*., p. 519.

[53] In addition, for decades it was considered "undemocratic" to place supra-national authority in the hands of judges – both domestic and European. See comment in: I. Loveland, *op. cit*., p. 667.

[54] White Paper, Rights Brought Home: The Human Rights Bill, Cm 3782, 1997, London: HMSO para 2.14 (in: H. Barnet, *op. cit*., p. 513).

[55] I. Loveland, *op. cit.,* p. 720.

[56] Judges are not bound to "follow slavishly" ECtHR judgments. See: H. Barnet, *op. cit*., p. 513.

[57] Leeds City Council v Price (2006).

Court was bound to follow the House of Lords' one[58]. However, the novelty is that domestic courts implement the principles of proportionality and necessity, tools developed by the ECtHR which are more generous in protecting human rights than is the case with the unreasonableness test employed in judicial review. In *R v Secretary of State*[59] the House of Lords applied the test of necessity when concluding that some prison policies (*inter alia*, search of privileged legal correspondence) are unlawful[60].

The case of *A v Secretary of State*[61] is a good example of the HRA's achievements, according to Professor Loveland[62]. The case dealt with the Anti-Terrorism, Crime and Security Act 2001, which in s (23) gave the power to the Home Secretary to detain for an indefinite period without criminal charge any foreigner, which the Home Secretary finds to be a terrorist, if the person does not return to his home country. The House of Lords found that s (23) is a disproportional measure to achieve the protection of the public from terrorist attacks and that the section breached the prohibition on nationality-based discrimination. An Incompatibility Declaration was issued. The Government could have opted to act according to s (23). Instead it chose to amend the section. On the other hand, Professor Diamantides points out the lack of judicial (political) power to declare the declaration of (indefinite public) emergency as incompatible with the HRA, even though the court had previously found that the indefinite state of public emergency is not a qualifying reason to derogate from the right to fair trial[63]. Finally, in February

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[58] See: H. Barnet, *op. cit.*, p. 513.

[59] *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26. For the comment see: I. Loveland, *op. cit.*, p. 759. and H. Barnet, *op. cit.*, p. 519.

[60] Another example in: *R v Chief Constable of Sussex ex Parte International Trader's Ferry Ltd* [1999] 2 AC 418 court used proportionality to judge on the number of police officers caught in demonstrations between animals exporters and animal rights activists and concluded that number of police officers should be proportionate to the right of exporters to export and demonstrators to peacefully demonstrate. See: *Constitutional and Administrative Law*, Student Handbook 2008/2009, School of Law, Birkbeck College, p. 88.

[61] [2004] UKHL 56; [2005] 2 AC 68.

[62] I. Loveland, *op. cit.*, p. 761.

[63] *Constitutional and Administrative Law,* Student Handbook 2008/2009, School of Law, Birkbeck College, p. 36. For further details on the case see: M. Allen, B. Thompson, *Cases and Materials on Constitutional and Administrative Law,* 8 th edition, Oxford University Press, 2006, p. 775. For further details on Declaration of Incompatibility see: D. Feldman, *op. cit.*, p. 91.

2009 in *A and others v UK*, the ECtHR found different violations of the right to liberty[64] and lack of compensation rights at the national level[65].

The HRA allows judges to strike down secondary legislation unless the parent Act makes it impossible, with the exception of Orders in Council which HRA protects[66]. Giving Orders in Council protection that is guaranteed to primary legislation has been criticised[67]. In this context the HRA compromised parliamentary sovereignty by making it possible for the executive to pass a law, without parliamentary authority, that defies Conventional rights[68].

Is the HRA a "constitutional" Act, and does it contravene Dicey's doctrine of Parliamentary sovereignty? The HRA did not have as an aim to "entrench" human rights and in that way fill the gap of a non-existent written constitution. However, it contravenes "orthodox" Parliamentary sovereignty similarly to the ECA: both pieces of legislation "instruct the court as to the principles of statutory interpretation which they should deploy"[69]. The Blair government, which introduced the HRA, took the view that judges will be better than politicians to "draw the *preliminary* conclusion as to whether moral principles have been compromised", but the power to draw the *final* decision stays in the same hands[70]. From that point one can hardly argue a special constitutional status for HRA, but the main point is that judges have gained some political power by being able to signal to Parliament "unmoral" actions.

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64 The court found that there was a violation of Article 5(1) (right to liberty and security) because the applicants were not being held with a view to deportation and their indefinite detention discriminated between nationals and non-nationals; article 5(4) (right to have lawfulness of detention decided by a court) as the applicants could not challenge the application against them. See: Application no 3455/05.

65 Interestingly, the court awarded low compensation on the grounds that the unlawful detention was imposed in the face of public emergency and as "an attempt to reconcile the need to protect the UK public against terrorism with the obligation not to send the applicants back to countries where they faced a real risk of ill-treatment". See: Application no 3455/05.

66 H. Barnet, *op. cit*., p. 515.

67 See: *ibid*. and D. Feldman, *op. cit*., p. 89.

68 D. Feldman, *ibid*.

69 I. Loveland, *op. cit*., p. 716.

70 *Ibid*., p. 736.

So far, the number of incompatibility declarations is small and judges more rely on the doctrine of deference, which protects the invisible line between the courts' and parliamentary competencies in a similar way as the ECtHR uses the doctrine of "margin of appreciation" to allow the states discretion with which the ECtHR is not interfering[71]. Several cases illustrate this point[72]. In *Alcorbuny*[73] the House of Lords ruled that planning matters are within the competencies of the executive, not the court. In discussing whether mandatory life sentence for all convicted murders is in breach with Convention rights in *Lichniak*[74] the House of Lords ruled that the policy should be determined by Parliament, not courts. In *Prolife Alliance v BBC*[75] the House of Lords overturned the decision of the Court of Appeal by deciding that limits of freedom of expression should stay within the power of Parliament.

4. CONCLUSION

This essay has examined critically the view that the UK parliament has unlimited sovereignty. However, despite this long-held view, it is no longer the case today. Britain still does not have a written constitution but it has new legal shackles: EU membership which requires unconditional observance of EU laws, and the HRA 1998.

The ECA made parliamentary sovereignty subject to EU law supremacy, as confirmed by a body of case law. However, HRA achievements are more modest. Politicians may come under pressure if a Bill is not compatible with the HRA and citizens can protect their rights before domestic courts, but there is no legally binding mechanism to protect Convention rights from the will of parliamentary majority. More problematic is that executive prerogative powers are treated as primary legislation for the purposes of HRA. However, judges now have an instrument to protect human rights, and

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71 In addition to doctrine of deference which is the main reason for small number of incompatibility declarations, others are mentioned: 1) HRA does not have retrospective effect and therefore cannot be applied on facts occurred before it; 2) there are cases where declarations have been overturned on the appeal and 3) any procedural defects will turn cases to supervisory jurisdiction of the courts. See: H. Barnet,. *op.cit*., p. 520-521.

72 For further details see: *Ibid.,* p. 521-522.

73 R v Secretary of State for the *Enviroment ex parte Holding and Barnes plc* [2001] UKHL 23.

74 *R v Lichniak* [2002] UKHL 47.

75 R (on the application of Prolife Alliance) v British Broadcasting Corporation [2003] UKHL 23.

future cases may depend on their willingness to use it, possibly to challenge (through an incompatibility declaration) the executive's use of an *indefinite* state of emergency as a legal excuse to derogate from Convention rights[76].

Both ECA and HRA have changed the constitutional system, the first based on economic interests, the second on the political pressure to protect human rights. How long the change will last nobody knows. The UK may decide to leave EU (especially if one imagines the EU incorporating ECHR as directly effective law) and new reasons could be found for derogation from Convention rights. This is unlikely to happen, but one can never be sure.

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Dejstvo Zakona o Evropskim zajednicama iz 1972. godine i Zakona o ljudskim pravima iz 1998. godine na ustavni poredak Ujedinjenog Kraljevstva u pogledu principa parlamentarne suverenosti

Rezime

U radu autor je analizirao dejstvo Zakona o Evropskim zajednicama iz 1972. godine i Zakona o ljudskim pravima iz 1998. godine na ustavnopravni poredak Velike Britanije. Zakon o Evropskim zajednicama je potčinio parlamentarnu suverenost Velike Britanije pravu Evropske unije, što je potvrđeno u sudskoj praksi. Članstvo u EU zahteva bezuslovno poštovanje prava EU. S druge strane, efekti Zakona o ljudskim pravima su skromniji. Političari mogu biti pod pritiskom, ako nacrt zakona nije kompatibilan sa Zakona o ljudskim pravima, a građani mogu tražiti zaštitu svojih prava pred domaćim sudovima. Međutim, u Velikoj Britaniji ne postoji pravno obavezujući mehanizam za zaštitu prava iz Evropske konvencije o ljudskim pravima od volje parlamentarne većine.

I Zakon o Evropskima zajednicama i Zakon o ljudskim pravima su promenili ustavni sistem Velike Britanije. Zakon o Evropskim zajednicama je doneo promene koje se zasnivaju na ekonomskom interesu, a Zakon o

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[76] For a discussion of this issue, see Diamantides, *op. cit*., p.36.

[*] London.

ljudskim pravima promene zasnovane na političkom pritisku da se štite ljudska prava. Koliko će dugo ove promene trajati, ne može se u ovom trenutku znati. Velika Britanija može odlučiti da napusti EU (naročito ako bi se dogodilo da EU inkorporiše Evropsku konvenciju o ljudskim pravima kao direktno primenjivo pravo), a mogu se pronaći novi razlozi za odstupanje od prava iz Evropske konvencije o ljudskim pravima. Ovo se verovatno neće dogoditi, ali niko ne može biti siguran.

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SOME CRITICAL REMARKS CONCERNING THE ACT ON THE PROTECTION OF COMPETITION OF THE REPUBLIC OF SERBIA

1.Abstract

The purpose of this paper is to present the Act on the Protection of Competition of the Republic of Serbia by analyzing its provisions, and to partially compare these provisions with regulations in the region and with EC competition law. The Act on the Protection of Competition (hereinafter: ACP)[1] was adopted on September 16, 2005, by the Serbian National Assembly and entered in force on April 12, 2006, after the Commission for the Protection of Competition had been established. The Act is composed of 78 articles and divided in five chapters: general provisions, violation of competition, the Commission for the Protection of Competition, sanctions and transitional and final provisions. The Act regulates three common and well-known forms of restraints of competition: restrictive agreements, abuse of dominant position and concentrations. Based on theoretical analyses and enforcement experience with the new Act so far, in the final chapter of this article will identify some deficiencies and suggest appropriate amendments.

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[1] Zakon o zaštiti konkurencije, *Sl. Glasnik RS (Official Gazette of the Republic of Serbia*), no. 79/2005. available at <http://www.kzk.org.yu/?link=96&lang=1> (as of January 2008).

Key words: *Act on the Protection of Competition of the Republic of Serbia, competition, restrictive agreements, abuse of dominant position, concentration.*

1. BRIEF HISTORY OF COMPETITION LEGISLATION IN THE REPUBLIC OF SERBIA

In the framework of the process of stabilization and association, launched by the European Union as a political platform for negotiations with the countries of the Western Balkans, and therewith following the process of harmonization of domestic law with EU law, the National Assembly of Republic of Serbia adopted on September 16, 2005 the Act on the Protection of Competition.

By adoption of this Act, Serbia as a legal successor of the Yugoslavian Kingdom,[2] Socialist Yugoslavia,[3] the Federal Republic of Yugoslavia[4] and the State Union of Serbia and Montenegro[5], respectively, continues the legislative tradition of protecting competition in the domestic market. Professor Straus was one of the first authors who thoroughly wrote on Yugoslav Competition Law.[6]

Nevertheless, besides a relatively developed legislative background, the beginning of systematic enforcement of the competition legislation in the

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[2] The Kingdom of Serbs, Croats and Slovenes existed from December 1, 1918 to January 6, 1929. It then was re-named by the King Alexander I in 'The Kingdom of Yugoslavia' also known as the First Yugoslavia, which existed until November 29, 1943/1945.

[3] The Kingdom of Yugoslavia in 1946 was renamed to Federal People's Republic of Yugoslavia. In 1963, the country's name was again changed to Socialist Federal Republic of Yugoslavia (SFRY). Starting in 1991, the SFRY disintegrated.

[4] The Federal Republic of Yugoslavia (FRY) (from April 27, 1992 to February 4, 2003), was a federation on the territory of the two remaining republics of Serbia (including the autonomous provinces of Vojvodina and Kosovo and Metohija) and Montenegro.

[5] The State Union of Serbia and Montenegro was constituted on February 4, 2003, and officially abandoned the name 'Yugoslavia.' On June 3 and June 5, 2006, Montenegro and Serbia respectively declared their independence, thereby ending the last remains of the former Yugoslav federation.

[6] See J. Straus, *Das Wettbewerbsrecht in Jugoslawien - Eine entwicklungsgeschichtliche und systematische Darstellung mit Hinweisen auf das deutsche Recht,* (1970); J. Straus, Die Entwicklung des jugoslawischen Wettbewerbsrechts und die Neueregelung von 1974, *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* (*GRUR Int.*) 1976, S. 426.

market of Serbia started after the enactment of the Anti-monopoly Act in 1996,[7] which was the predecessor of the current APC. However, after a relatively short period of time, the Anti-monopoly Act was replaced. The purpose of enacting the new Act was to react, among others, to two major shortcomings.

One major shortcoming of this Act was the Anti-monopoly Commission's lack of independence, since the Anti-monopoly Commission was founded as a department of Ministry for Trading and Services. In addition, the new Act did not regulate mergers and other and other forms of concentrations in the market.

Immediately after the APC of 2006 took effect, in order to enforce it, the Government of the Republic of Serbia enacted two regulations: the Regulation on Criteria for Defining the Relevant Market and the Regulation on the Content and Method of Submission of Request for Issuing Approval for Proposed Concentration.[8] Simultaneously, protection of competition was raised on a constitutional level. Article 82(1) of the Constitution of the Republic of Serbia of 2006[9] guarantees the market economy characterized by an open and free market, freedom of entrepreneurship, independence of business entities and equality of private assets and other types of assets. As to competition the Constitution ensures equal legal status for everyone in the market, and that acts which are illegal and restrict free competition by creating or abusing monopolistic or dominant status, shall be strictly prohibited.[10]

2. THE LEGAL REGIME OF THE COMPETITION ACT

The Act consists of 78 articles, grouped in five chapters, named as follows: Chapter I – General Provisions (Articles 1 to 6); Chapter II –

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[7] Antimonopolski zakon, Službeni list Savezne Republike Jugoslavije, br. 29/96, published in: Official Gazette of FR Yugoslavia, No 29/96.

[8] Both published in *Official Gazette of the Republic of Serbia*, No. 94/2005, and in force since November 12, 2005, available at <http://www.kzk.sr.gov.yu/?link=81&lang=1> (as of January 2008).

[9] Ustav Republike Srbije, *Sl. glasnik (Official Gazette of Republic of Serbia*), No 83/06, of September 30, 2006, available at <http://www.parlament.sr.gov.yu/content/eng/akta/ustav/ustav_3.asp> (accessed January 2008).

[10] Art. 84(1) and (2) of the Constitution of Republic of Serbia.

Violations of Competition (Articles 7 to 30); Chapter III – Commission for the Protection of Competition (Articles 31 to 69); Chapter IV – Penalty Clause (Articles 70 to 74) and Chapter V – Transitional and Final Provisions (Articles 75 to 78).

2.1. General provisions

Articles 1 to 7 determine the purpose and the aim of the Act, define the concepts of different restraints of competition and of the relevant market, as well as the territorial and personal scope of application, including the application to related undertakings.

2.1.1 Subject Matter and Purpose of the Act

The subject matter and purpose of the Act is determined as the 'protection of competition in the market in order to provide identical conditions for undertakings, with the aim to improve economic efficiency, and accomplish economic welfare for the whole society.' From a perspective of legal theory, the purpose defined like this is compatible with the opinion that competition law is divided into rules against restraints of competition and those preventing and suppressing unfair practices.

The Act only regulates restraints of competition, in order to protect competition itself instead of protecting participants in the market. In contrast, the Trading Act[11] deals with unfair practices and prohibits such practices, speculations and restrictions of the market. Unlike good business customs and practice, the concept of unfair practices refers to any merchant's activity that harms other merchants, or legal entities or consumers.[12]

Through setting these aims, the Serbian legislature accepted a contemporary concept of the economic and social role of competition legislation, with an emphasis on economic goals, referred to as 'economic

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[11] Zakon trgovini, Sl. glasnik RS, (Official Gazette of Republic of Serbia), no. 85/2005, of October 6, 2005.

[12] The same approach is applied in the European Union where unfair competition between companies is a matter of the domestic law of the Member States. *See* OECD, Competition Law and Policy in the European Union 35 (2005), available at <http://www.oecd.org/dataoecd/7/41/35908641.pdf> (as of January 2008).

efficiency.'[13] Social goals are indicated by the Act by reference to the promotion of 'economic welfare' for the whole society, particularly consumer benefits. Nevertheless, the position of consumers is not determined only by this Act, but mainly by the more specific Consumer Protection Act.[14]

The Act starts with the presumption that fulfilling general aims and protecting actual interests of the market participants is possible by controlling market power beyond a legally defined level, as well as conspiracies of undertakings harmful to consumers. In general, the Act aims to sustain the market structure by supporting the relations of the market participants that do not harm competition. Furthermore, the Act provides market participants with legal remedies against distortions of competition and conduct that threatens to distort competition. It also empowers the Commission for the Protection of Competition to take sanctions and other measures in order to prevent further distortions of competition and removes the damage caused by such distortions.

Restraints of competition are considered to be the following acts and practices of economic entities and other legal entities and people participating in the market:

1) agreements, which considerably prevent, restrict or distort competition;

2) abuse of dominant position; and

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[13] Just as a comparison, in the European Union it is expected from competition policy to integrate national markets and sustain the common internal market, as well as to provide equality and fairness, and ultimately to maintain competition. Pursuant to that, the Treaty establishing the European Economic Community considers that 'the institution of a system ensuring that competition in the common market is not distorted' constitutes one of the necessary means for promoting 'a harmonious, balanced and sustainable development of economic activities' and 'a high degree of competitiveness.' In Bosnia and Herzegovina, the Law on Competition is expected 'to maintain and stimulate economic competition and to ensure the free determination of prices for goods and services.' For detailed overviews of the objectives and proposes of competition legislation, *see* UNCTAD, Model Law on Competition, TD/RBP/CONF.5/7, at 11 (2000), available at <http://www.unctad.org/en/ docs/tdrbpconf5d7.en.pdf> (as of January 2008).

[14] Zakon o zaštiti potrošača, *Sl. glasnik RS (Official Gazette of the Republic of Serbia)*, no. 79/05, of September 16, 2005, available at <http://www.parlament.sr.gov.yu/ content/lat/akta/akta_detalji.asp?Id=278&t=Z#> (as of January 2008).

3) concentrations causing considerable prevention, restriction or distortion of competition, particularly as a result of the creation and strengthening of a dominant position in the market.

This is a common way to identify restraints of competition known to legal systems of neighboring countries[15] and to Community law.[16] But for their assessment, the Act differentiates between restrictive agreements and concentrations on the one side and abuse of dominant position on the other side, with regard to their relevance for competition. The first two forms of behavior in the market are treated with less severity, prohibited only agreements and concentrations leading to relevant, *e.g.* considerable or fundamental harm to competition, whereas every abuse of dominant position is a prohibited restraint of competition. In dividing competition restraints by their relevance, certain criteria are required for distinguishing them. The duty to formulate such criteria was entrusted to the Government of the Republic of Serbia. Nevertheless, since the Government did not formulate the requested criteria, the Commission for the Protection of Competition in practice relied only on criteria established in the Act. Pursuant to Art. 2(2) of the Act, considerable prevention, restriction or distortion of competition are to be assessed from case to case, in light of the level and scale of the changes in the structure of relevant market, restrictions on and remaining possibilities of equal market access for new competitors, reasons for withdrawal from the market by existing competitors, changes restricting the possibilities for market supply, the level of consumer benefits and other circumstances restricting competition.

It seems that the legislature has brought in some unnecessary dilemma by introducing a qualified form of a restraint of competition, referred to as a 'considerable prevention, restriction or distortion' as a necessary element for banning an agreement, and thereby created the need for future

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15 *See* for example the Act on Competition of Bosnia and Herzegovina, <http://www.bihkonk.gov.ba/en/index.html>; the Competition Act of the Republic of Croatia, <http://www.aztn.hr/eng/pdf/zakon/zztn.pdf>, the Law on the Protection of Competition of the Republic of Macedonia, implemented as of January 1, 2005, with amendments in *Official Gazette of Republic of Macedonia* no. 22/07.

16 *See* Articles 81 and 82 of the EC Treaty. These provisions will remain the same under the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, December 13, 2007, 2007 OJ C 306, p. 1.

clarification by practice. According to the competition rules of the neighboring states and the European Union conduct involving restrictive or cartel agreements is assessed in light of its effect on trade between the Member States or on the entire common market or a relevant part of it, instead of abstractly qualifying the restrictive nature.[17] In other words, whether conduct of market participants prevents, restricts or distorts competition is assessed in light of its potential or actual effects or consequences on the common market or a relevant part of it.[18]

However, the Act does not regulate state aid. The matter of state aid for undertakings is of special relevance, since former socialist states like Serbia used to develop a peculiar, protective attitude towards certain undertakings, especially those owned by the state. Keeping in mind that those states play a significant role in the process of transition of the economy, it was expected that these issues would be regulated. The reason why this was not done lies, for the most part, in the political environment and economic demand for a fast ending of the process of privatization. Besides, the content of the new State Aid Act has been in the preparation process for more than two years, and it is still in the phase of drafting, which confirms the sensitivity of this matter.[19] The current Draft requires a special regulatory body to be established in order to enforce the Act.

2.1.2 Territorial and Personal Scope of Application

Regarding the territorial scope of application, the APC adopts the effects doctrine. This means that the APC is applicable to practices and acts conducted in the territory of the Republic of Serbia and to practices and acts conducted in foreign territory, having the effect of distorting competition in the market of the Republic of Serbia.

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[17] *See* Art. 81 of EC Treaty by which 'all agreements between undertakings, decisions by associations of undertakings and concerned practices, which may be affect trade between Member States and which have as object or effect the prevention, restriction or distortion of competition within the common market' are prohibited as incompatible with the common market.

[18] A similar formula was adopted by Art. 2(1) of the Act on Competition of Bosnia and Herzegovina and by Art. 2 of the Competition Act of the Republic of Croatia.

[19] The draft is available at <http://www.mfin.sr.gov.yu/src/1186/> (as of January 2008).

In a personal sense, the Act shall apply to all legal and natural persons and government bodies, institutions of regional autonomy and local self-governments that are engaged, directly or indirectly, in the trade of goods or services, and which by their acts and practices violate or may violate competition (hereinafter: undertakings) in particular to:

1) business enterprises, entrepreneurs and other forms of enterprises regardless of their form of ownership and seat, and for entrepreneurs, in addition, regardless of their nationality and permanent residence;

2) other natural and legal persons who are engaged, directly or indirectly, in a permanent, single or temporary trade of goods and/or services, regardless of their legal status, form of ownership, nationality, seat or permanent residence, such as trade unions, business associations, sports organizations, institutions, cooperatives, owners of intellectual property rights, etc.; and

3) government bodies, institutions for regional autonomy and local self-governments, when directly or indirectly engaged in trade of goods or services.

Pursuant to this Act, the definitions of companies, public enterprises and private enterprises are contained in the Law on Business Companies20 and in the Act on Public Enterprises. Essentially these definitions do not differ from the concept of an undertaking in EC jurisprudence.21 The key element for all of these market participants is participation in any trade of goods and/or in the provision of services in the market in the sense of any economic activity.

The Law shall also apply to related undertakings. Pursuant to Article 5(2), two or more undertakings shall be considered as related undertakings when one of them:

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[20] Zakon o privrednim društvima, *Sl. glasnik RS (Official Gazette of Republic of Serbia)* no. 125/2004, published on November 22, 2004, in force since November 30, 2004. In Serbian language available at <http://www.parlament.sr.gov.yu/content/lat/akta/akta_detalji.asp? Id=178&t=Z> (as of January 2008).

[21] The ECJ has defined the concept of an undertaking as 'any entity engaged in a economic activity, regardless of its legal status an the way in which it is financed.' *See* Case C-41/90, 1991 ECR I-1979, para. 21 – *Klaus Hoefner and Fritz Elser v. Mactrotron GmbH*; Case C-475/99, 2001 ECR I-8089 – *Firma Ambulanz Glöckner v. Landkreis Südwestpfalz.*

a) directly or indirectly, exercises decisive influence on the management of another undertaking particularly on the grounds of holding the majority of share capital; or

b) exercises more than half of the voting rights in management boards and has a right to appoint more than half of the members of the management or the supervisory board and the bodies authorized to act as proxies to the undertaking and agreements on transfer of controlling interest. Two or more related undertakings pursuant to this Act shall be considered as a single undertaking.

This Act shall apply to business enterprises, other forms of enterprises and entrepreneurs engaged in economic activities of general economic interest, as well as to such institutions entrusted with a fiscal monopoly. These are often State-controlled or undertakings to which the state granted special or exclusive rights comparable to undertakings in the sense of Article 86(2) EC. It is not important whether such undertaking is public or private, provided that economic activities of general economic interest have been entrusted to it by an act of public authority. However, the application of the Act may not prevent the performance of activities of general economic interest, *i.e.* entrusted activities. The wording 'prevents the performance of activities' is clear referring to a very strict interpretation of this exception. It is not sufficient that compliance with the provisions of the Act merely complicates the exercise of the entrusted activities.

2.2. Acts and Practices Preventing, Restricting or Distorting Competition

2.2.1 Restrictive Agreements

According to the APC, competition can be affected by 'acts and practices.'[22] As such acts affecting competition, the legislature considers agreements, contracts and single provisions of contracts, explicit or tacit agreements, concerted practices and decisions of associations of undertakings, which are specified by the technical term 'agreements.' In comparison with EC competition law, the APC gives wider meaning to the word 'acts' than the community concept of 'agreement' in such way that the word 'acts' includes 'contracts' and 'a certain part of contracts.' Moreover, introducing the concept of 'contract' in addition to 'agreement'

[22] The uncommonly used phrase 'acts and behavior' can be found in UNCTAD, Model Law on Competition, *supra* note 13. *See* commentary to Articles 3 and 4.

without clear criteria for distinction can cause ambiguity. Even in a legal context these terms can be misinterpreted.

A restrictive agreement's bad or prohibited outcome is assessed by an object or effect regarding the level of influence on competition and the relevant market. The difference between the object and the effect of prohibited agreements can be explained by the legislature's intention to cover not only agreements that involve intent of the contracting parties to restrain competition at the moment of signing the agreement, but also the agreements that regardless of the contracting parties' intent, can objectively cause prevention, restriction or distortion of competition. In some foreign legal systems, agreements that have the purpose of harming competition, like price agreements or market division agreements, are forbidden *per se*. The Serbian Competition Act instead does not rely on any *per se* prohibition.

The level of influence on competition is determined by the term of 'considerably' preventing, restricting or distorting competition. This can be interpreted in various ways and will have to be clarified by practice. In Serbian legal writing, the term 'considerably' is regarded as opening room for accepting a *de minimis* rule and for the recognition of agreements of minor importance that do not come under the cartel prohibition of the Act.[23]

A second element that must exist in restrictive agreements is related to the impact or influence on competition. In the APC, it is an accepted well-known opinion that, for restrictive agreements, it is enough to show that they could have negative impact on competition, regardless of their actual harm to competition. In other words, the expression 'may effect' implies that within a sufficient degree of probability an agreement is capable of having an effect on trade or competition. In the EC, the CFI has developed a test in order to establish whether an agreement or practice is likely to affect the competitive structure inside the Community by altering the patterns of trade.[24]

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[23] See R. Vukadinović, Zakon o zaštiti konkurencije (Preface to the Act for Protection of Competition), 2006, p. 24.

[24] *See* Case 56/65, [1966] ECR 235, 249 – *Société Technique Minière (L.T.M.) v. Maschinenbau Ulm*: 'For this requirement to be fulfilled it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between member states.'

Finally, as a third element, the violation of competition must considerably affect 'the relevant market.' According to Article 6(2) of the Act, the relevant market is defined as the relevant product market and the relevant geographical market. The relevant geographical market is the market of the Republic of Serbia, while the relevant product market is defined by the set of goods and/or services that can be substituted for each other under the reasonable terms from the standpoint of the consumers of said goods and/or services. This particularly concerns their quality, normal use and price. The criteria for determining the relevant market are defined by the Regulation on the criteria for defining the relevant market.[25] According to Article 2(1) of this Regulation, the relevant market shall be defined by application of the SSNIP (small but significant non-transitory increase in prices) test. This test, which is also known as the hypothetical monopolist test, requires the definition of the specific market for particular products or services where the hypothetical monopolist could profitably introduce a small, but significant and permanent increase in price.[26]

Pursuant to the Act, prohibited agreements are null and void, but some agreements or group of agreements can be exempted from the prohibition. There are two procedures for granting an exemption to a particular agreement or to a part of such agreement: a procedure for individual exception and a procedure for group or block exemptions. Article 9(1) of the Act only provides for general conditions for an individual agreement exemption procedure and entrusts the Commission to decide on it. The Commission may, at the request of the parties to the agreement, grant an exemption to a particular agreement or to a part of such agreement (individual exemption) in case such agreement or a part of such agreement contributes to the improvement of production or distribution. This refers to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit. The restrictions that are imposed are only those that are necessary for the attainment of these objectives, and do not provide the possibility of eliminating competition in respect of the substantial

[25] Sl. glasnik RS (Official Gazette of the Republic of Serbia), no. 94/2005.

[26] Pursuant to this Regulation, a small but significant increase in price is an increase in price in the range of 5 to 10%, while within the meaning of this Regulation more permanent increase in price is a price rise of up to one year.

part of relevant goods or services market. The burden of proof concerning the existence of terms for individual exemptions shall be borne by the applicant.

The government has power to define in more details conditions for group exemptions and determines certain categories of agreements to be exempted from the prohibition. The Act provides that horizontal agreements, in particular agreements on specialization, research and development as well as on cooperation may be exempted from the prohibition. As exemptible vertical agreement, the Act enumerates those involving exclusive sale or supply, exclusive distribution, exclusive allocation of customers, selective distribution, distribution or franchise services. These are prohibited as part of agreements on exclusive distribution or supply, and exclusive representation, according to which the agent carries the business risk, restrictions of sale to end users by wholesale merchants and transfer of technology. These vertical agreements may be exempted from the prohibition in case they are concluded for a period longer than 5 years and that they are in effect in particular parts of the territory of the Republic of Serbia. The possibility to group-exempt agreements has so far never been used due to the fact that the Government did not enact regulations on conditions for group agreement exceptions and did not determine categories of agreements that can be exempted, although agreements match the foregoing conditions.[27]

2.2.2 Abuse of a Dominant Position

Another way to harm competition relates to the behavior of undertakings that have a dominant position in the market. Although the APC does not specifically say that a monopoly position is considered dominant, one or more undertakings can hold legally relevant market power, described as a dominant position.

The APC regulates both cases of individual and collective market power. The Act does not address how undertakings acquire their dominant position; it only regulates their behavior of undertakings that hold such position in the market. It is important that relevant market power derives from economic and not legal relations. The main thing is to determine legal criteria for the existence of a dominant position. Practice shows that, besides monopoly as an extreme form of dominant position, which is to be assessed by using

[27] The Commission for the Protection of Competition submitted a draft for such regulation at the end of 2006, but its adoption was postponed because of amendments to the Act.

economics, other forms of dominant position are determined in a legal sense in light of market shares.

The Serbian legislature takes this approach by combining it with other elements depending on whether an individual undertaking or a group of undertaking might have dominant position. Generally, an undertaking has a dominant position in the relevant market if it has the power to behave independently of other undertakings. Such undertaking is in a position to make business decisions without taking into account business decisions of its competitors, purchasers or suppliers and/or end users, their goods and/or services. In case an individual dominant undertaking has a market share in the relevant market that exceeds 40%, it may or may not be considered dominant, depending on other circumstances. These circumstances are for instance the market shares of competing undertakings in the same market, the existence of barriers to entry and the strength of potential competitors, as well as a possible dominant position of the buyer. An undertaking having a relevant market share below 40% may also be considered dominant, but in such a case the burden of proof is on the Commission or the applicant to demonstrate the undertaking's dominant position.[28] Above the market share threshold of 40%, the burden of proof is on the undertaking to show that it is not dominant.

Hence, the existence of market dominance has to be determined on the grounds of all relevant economic criteria defining the position of undertakings in relation to other undertakings, in particular as it concerns the quantity of goods and/or services and income realized from trade of goods and/or services.

According to these criteria, two or more undertakings having an aggregate relevant market share exceeding 50% may or may not be considered dominant. This depends among other things on the undertakings' share in the relevant market, the relative size of this share in relation to the share of other undertakings doing business in the same market, the existence of barriers to entry and the strength of potential competitors, as well as a possible dominant position of the buyer. If aggregate market share of two or more undertakings is below 50%, the burden of proof is on the Commission

[28] Also in the neighboring countries, a market share of 40% is very often chosen as the basis of a presumption for a dominant position. *See* UNCTAD, Model Law on Competition, *supra* note 13, commentary to Art. 4.

or the applicant to show that there is market dominance. Conversely, two or more undertakings having an aggregate relevant market share exceeding 50% bear the burden of proof that they are not dominant.

A dominant position as such is not prohibited. However, specific conduct of a dominant undertaking may be banned as abusive. This means that the mere structure of the market does not violate competition law. Violation of competition law can be based on specific 'behavior, practice or doing', which is addressed in this context as abuse of a dominant position. In that sense, the Act forbids abuse of dominant position in the relevant market. According to the Act, the abuse of a dominant position in the relevant product or services market is considered to be such practice which restricts, distorts or prevents competition, such as:

1) directly or indirectly imposing unreasonable purchase or selling price or other unreasonable conditions;
2) limiting production, markets or technical development, thereby causing harm to consumers;
3) applying dissimilar conditions to identical transactions with other trading parties, thereby placing them at a competitive disadvantage in the market; or
4) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial customs, have no connection with the subject of such contracts (tying practices).

Other kinds of conduct by dominant undertakings that disadvantage other parties in the relevant market could also constitute an abuse. Although there is no provision for an exemption, Community case law at least has developed a doctrine according to which otherwise abusive conduct is not prohibited under Article 82 EC if it is 'objectively justified.'[29]

2.2.3 Concentrations as a Form of Restraining of Competition

Concentrations, in general, are a way of merging two or more companies in order to achieve joint access to and to act in concert in the relevant market. This was once considered as beneficial conduct that led to

[29] *See* OECD, Competition Law and Policy in the European Union, 2005, at 26, available at <http://www.oecd.org/dataoecd/7/41/35908641.pdf> (as of January, 2008).

technological progress.[30] Nevertheless experience of developed markets showed that concentrations can affect markets and competition in such markets negatively. Especially this is the case when concentration of undertakings leads to the creation or strengthening of a dominant position in the market.[31]

Practice has shown that mergers cannot be properly regulated with cartel agreements and prohibition of abuse of dominant position alone; it was necessary to enact special legal rules that also address those kinds of behavior. Considering this being not just a legal, but also an economical question, regulation of mergers in other national legal systems and in the EU was implemented late in comparison to regulation of cartels and abuse of dominant positions. The Serbian Act finds its place among modern competition law in determining that it is possible to regulate and control mergers by enacting an obligation for the merging parties to submit an application for merger approval before the Commission for the Protection of Competition.

According to Article 21(1) of the Act, the following shall be considered as a concentration of undertakings:

1) status changes of undertakings, pursuant to the Law on Business Enterprises;

2) direct or indirect acquisition of control over the whole or a part of another undertaking by one or more undertakings;

3) establishment and joint control by at least two independent undertakings over a new undertaking acting on a fully independent and long-term basis and having access to the market (joint venture).

The control referred to by Art. 21(1) requires - according to Article 21(2) - decisive influence on an undertakings' business activities, on the grounds of granted rights, agreements or any other legal or actual facts, in particular the following:

a) ownership over or disposal with the whole or part of the property of an undertaking;

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[30] *See* UNCTAD, Model Law on Competition, *supra* note 13, at 28, box 11.

[31] This provision is similar to the balancing-test clause in Section 36 of the German Act against Restraints of Competition (Gesetz gegen Wettbwerbsbeschränkungen).

b) contractual authorization or any other grounds enabling decisive influence on the composition, activities or decision making of another undertaking.

The forms of control referred to in Article 21(2) shall be assessed independently or one in relation to another, whereas relevant legal and actual facts shall be taken into account but not the intention of the merging parties.

However, because of potential procompetitive effects of the concentration, the process and the result of the concentration are not *per se* prohibited. Similar to acquiring a dominant position, the procedure of implementing a concentration is not prohibited *ipso facto*. Prohibited concentrations are only those that considerably prevent, restrict or distort competition, by creating or strengthening a dominant position in the market.

This type of restraining competition, compared to the previous two, is legally regulated in a specific way, because protection is realized in advance (*ex ante*) and generally the object of protection is the market structure. Therefore, provisions on concentration aim to protect or preserve the actual market and market structure. This can be achieved by eliminating potentially distorting concentrations in advance. Pursuant to this, mergers shall only be carried out upon approval issued by the Commission at the request of the undertakings. The request shall be notified to the Commission within a period of eight days upon signing of the agreement or announcing a public bid offer or acquiring control. The request may be submitted when the parties have serious intentions to conclude an agreement by signing the letter of intention. This can also be done when the parties announce their intention to make the offer for purchase of shares. On proposal by the Commission, the Government of the Republic of Serbia has adopted a regulation on the content and method of submission of the request for authorization of concentrations (notification).[32]

Notification is only required for large concentrations assuming that only such concentrations can have a detrimental effect on the market structure and competition. The volume of a concentration is usually measured in overall

[32] *See* Regulation on the content and method of submittal of the request for issuing of approval for proposed concentration, *Official Gazette of the Republic of Serbia*, no. 79/05, available at <http://www.kzk.org.yu/?link= 81&lang=1> (as of January 2008).

turnover exceeding a certain threshold.[33] According to the Act a concentration requires *ex ante* approval if:

a) the combined annual turnover of all undertakings involved in the concentration effectuated in the market of Serbia exceeds the equivalent of €10 million in Serbian Dinar at the exchange rate on the date of making the annual calculation of the undertakings for the previous financial year, or - alternatively - if

b) the combined annual turnover of all undertakings involved in the concentration realized in the world-wide market exceeds the equivalent of €50 million in Serbian Dinar at the exchange rate on the date of making the annual calculation for the previous financial year, whereby at least one of undertakings involved in concentration has to be registered on the territory of the Republic of Serbia.

When assessing the effects of an intended concentration, the Commission shall assess whether such concentration considerably prevents, restricts or distorts competition, particularly as a result of the creation or strengthening of a dominant position in the market, taking into account the following indicators: the structure of the relevant market, existing and potential competitors, the market position of the parties involved in concentration and their economic and financial power, whether there is a possibility to choose another supplier or customer, legal and other barriers to entry in the relevant market, the domestic and international level of competitiveness of the parties involved in concentration, supply and demand of relevant goods and/or services, technical and economic development and consumers interests.

Considering the fact that the Act adopts a system of preventive control for concentrations with a duty to notify to the Commission, it is perceived that the defined levels are too low.[34] This is considered as an unnecessary burden for the applicants and for the work of the Commission itself.[35]

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[33] In Community law those concentrations are qualified as concentrations with a Community dimension.

[34] Notification thresholds vary in neighboring states. For example, according to Art. 25 of the Act of Protection of Competition of Montenegro, the request for approval is mandatory if the cumulative annual turnover of the merging parties realized in Montenegro exceeds €3 million in the previous fiscal year. Alternatively, notification is mandatory if the joint annual turnover in the world-wide market for the previous fiscal year exceeds €15 million and if at least one of the merging parties is registered in Montenegro, while in Croatia the thresholds are fixed at €135 million for the global market and €13.5 million for the

2.3. Commission for the Protection of Competition and Procedure Provisions

2.3.1 The Status of the Commission for the Protection of Competition and the Procedures before the Commission

The provisions of the Act are applied and enforced in administrative proceedings by a special regulatory body – the Commission for the Protection of Competition (hereinafter: Commission). The Commission consists of the Council for the Protection of Competition on the one hand and the Technical Service on the other hand. The Council, as a decision-making body, has five members and is responsible for making all decisions and other acts within the competence of the Commission. The Technical Service performs the professional activities within the competences of the Commission and consists of departments for restrictive agreements, abuse of dominant position and concentrations and of a general department and an international cooperation department.

Regarding its status, the Commission is an independent and autonomous organization entrusted with public competencies within the scope defined by the Act on the Protection of Competition. Independence and autonomy is ensured by the way of the appointment of its members and independent steering of the proceedings on the one hand and relative financial autonomy as compared to the Government and other state authorities on the other hand. The members of the Council are appointed by the Parliament on the proposal of institutions entrusted to propose the

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domestic market for each of at least two of the merging parties. In Bosnia and Herzegovina, a concentration needs to be notified if the total turnover of all participants adds up to at least KM100 million (€50 million), or at least two of the merging parties have a domestic turnover of at least KM5 million (€25 million).

[35] In this sense also the European Commission indicated that the turnover thresholds for notification are set too low. In addition the Commission argued that both thresholds - for the world-wide and domestic market - should be applied cumulatively. *See* also V. Radović, Zakon o zaštiti konkurencije RS (Act on the Protection of Competition of the Republic of Serbia), Pravo i privreda 1-4/2007, p. 19; Stevanović, Zaštita konkurencije u Srbiji (Protection of Competition in Serbia), *Srpska Pravna Revija,* 6/2007); Jankovic, Antitrust Does Not Protect Competition: A Critique of the Proposed Antitrust Regulation in Serbia, available at <http://www.mises.org/journals/scholar/Jankovic.pdf> (as of January 2008); and Svetlicinii, Efficiency Defence in the Merger Control Regimes of EC and Republic of Serbia: A Comparative Perspective, *Pravni život*, LVI (2007)XIV, p. 241.

members of the Council on a five-years term.[36] For its work, the Commission as a collective body is responsible to the Parliament. Council members are appointed among prominent experts within the legal or economic field, provided that they have specific expertise in the field of competition. This is the way how the Act ensures independence of the Commission.

Nevertheless, as regards the financial aspect, independence of the Commission is partially limited by the fact that the Government has to approve the financial plan. But, in return, the Government is obliged, if necessary, to provide additional means for financing the Commission's work.

2.3.2 Provisions on the Administrative Procedure

a) Initiation of Proceedings

The main task for the Commission is to enforce the Act and to impose appropriate measures and sanctions when a violation of competition law is established. In the proceedings before the Commission, unless otherwise regulated by this Act, the provisions of the General Administrative Procedure Act shall apply. Administrative proceedings start either with the application on request submitted by an interested party or on independent initiative by the Commission itself. The President of Council is obliged to issue a resolution on initiation of proceedings upon request within a period of eight days from the date of the submission of a request by the interested party. If the proceedings before the Commission involve parties with opposing interests, the Commission will be obliged to provide the request and resolution on the initiation of proceedings to the party against which the proceedings are conducted. This party is entitled to supply its own response to the request within a period set by Commission, which cannot be shorter than eight days.

The President of the Council shall make a resolution dismissing the request, if an unauthorized person has submitted the request, or the

[36] These iinstitutions are the Association of Lawyers of Serbia, the Association of Economists of Serbia, the Bar of Serbia, the Chamber of Commerce of Serbia and the Government of the Republic of Serbia.

practice stated in the request is not restricting, preventing or distorting competition.

b) Parties Eligible to Initiate Proceedings

The right to initiate proceedings belongs to the Commission as well as undertakings and parties concerned.

The Commission *shall* make a resolution on initiating proceedings *ex officio* requesting the Technical Service to conduct it, if the Commission finds, on the grounds of information or otherwise, that the practice concerned is likely to cause harm to competition pursuant to the provisions of this Act. The Commission *may* initiate proceedings *ex officio* if it finds that the practice concerned

a) is likely to cause considerable distortion, restriction or prevention of market competition; and

b) it proves likely that the notifying party has insufficient funds to initiate and conduct the proceedings or that conduct of proceedings *ex officio* is necessary in order to protect the identity of the interested party.

Resolution on initiating proceedings *ex officio* shall be made by the President of the Council.

An interested market participant, empowered to request the Commission to establish a violation of competition law, is defined as a party that suffers or risks to suffer damage. But also parties to an agreement, undertakings with a dominant position or the parties to a concentration have a right to initiate proceedings. Parties to an agreement may request to establish whether a particular agreement is not prohibited. An undertaking that has a dominant position in the relevant market may request from the Commission to issue a decision establishing that particular practice, which such undertaking intends to engage in, is not considered to be abusive. In case of concentrations, the Commission is authorized to initiate proceedings upon the request for authorization of concentration, submitted by

1) the parties to the concentration in case of status changes of the undertakings or a joint venture; or

2) an undertaking or the undertakings acquiring the control over another undertaking or a part of an undertaking.

The following are defined as market participants who suffer or risk to suffer damage: the Chamber of Commerce, an association of employers and entrepreneurs, a consumer protection association and state administrative bodies and regional and local self-government authorities.

c) The Closure of Proceedings

The Commission brings proceedings to an end by making a decision on the undertakings' rights and obligations. Such decision can be made in summary or following regular proceedings depending on the need to conduct investigation or not. Without conducting investigation the Commission can immediately make a resolution if:

1) parties with opposing interests are not involved in the proceedings;
2) a party in its request supplies facts or submits evidence on the basis of which it is possible to establish the facts or relevant circumstances or if the facts and circumstances can be established on the grounds of facts found by the Commission;
3) in the proceedings initiated upon the request for authorization of concentration, on the grounds of submitted evidence and other facts found by the Commission, it is justifiably assessed that the concentration shall not considerably prevent, restrict or distort competition, particularly as a result of the creation or strengthening of a dominant position in the market; or
4) it is not necessary to hold a special hearing of the interested party in order to protect its legally protected interests.

In other cases, the Commission institutes regular proceedings.

Depending on the subject matter, the Commission shall make a decision establishing a violation of this Act, if the agreement or some of its provisions considerably prevent, restrict or distort competition, or if a dominant position is abused, as well as a decision on exemption from prohibition of the agreement. These decisions must be handed down within a period not exceeding:

a) four months following the day of the submission of the request, in proceedings instituted at the request of an interested party, or
b) six months following the day of the resolution on initiation of proceedings conducted *ex officio*.

In concentration cases the Commission is obliged to make a decision upon request for the authorization of concentration within a period of four months following the day of the submission of the request. In its decision, the Commission may conditionally or fully approve or refuse to grant authorization for concentration. If summary proceedings take place, the Commission is obliged to hand down its decision authorizing concentration within a period of one month following the day of the submission of the request.

Decisions made by the Commission shall be final. Against the final decision of the Commission, an administrative dispute may be initiated before the Supreme Court within 30 days and the provisions of the General Administrative Procedure Act shall apply.

2.4. Sanctions

The Act on the Protection of Competition pursues two types of sanctions for violation of the Act, namely measures and fines.

The Commission may take various measures when undertakings do not obey a decision that establishes violation of the prohibition of restrictive agreements and the abuse of a dominant position. Besides establishing violation of competition law, decisions may order measures for removing the negative effects of the violation. If, in cases related to restrictive agreements and abuse of market dominance, undertakings fail to act pursuant to the measures within the time limits set by the decision, the Commission is obliged to make a decision imposing on the undertaking concerned a temporary prohibition of trading a particular type of goods and/or services in the relevant market, not exceeding a period of three months. If these measures do not produce any results, the Commission can prohibit economic activities for a period not exceeding four months. Nevertheless, in cases of an abuse of a dominant position, the Commission is not authorized to take measures such as divestiture of the dominant undertaking, transfer of its assets, shares and participating interest, termination of agreements or waiving of rights enabling exercise of prevailing influence on another undertaking. Even in the cases of unauthorized concentration, the Commission does not have authority to adopt measures of de-concentration.

Imposing a fine is the second type of sanction. However, the Commission itself may not impose fines; it only has power to request the relevant infringement authority to initiate infringement proceedings against undertakings performing acts that prevent, restrict or distort competition.

An undertaking may be fined from 1 to 10% of its total annual turnover realized in the financial year preceding the infringement.

3. FINAL REMARKS WITH A CRITICAL REVIEW

The Commission's short experience with the enforcement of the Act so far has already revealed some weaknesses regarding the substantive provisions the Act and also regarding the procedural rules.

As to substantive provisions, the Act provides no precise criteria for interpreting the doubtful concept of '*considerable* prevention, restriction and distortion of competition' in the framework of defining restrictive agreements. Regarding concentrations, the notification threshold is too low, since it requires large market participants to ask for approval for almost every single transaction. This can lead merger control in the wrong direction. The bottom line of setting merger thresholds would be to free the merger control body from dealing with small retailers, which most certainly cannot significantly affect competition. If those thresholds are too low, the competition agency ends up being swamped with cases and will be financially unable to deal with cartels and abuses of dominant positions. A solution to this problem would consist in raising the thresholds and making the domestic and world-wide turnover thresholds cumulatively applicable.

Major criticism concerns the part of the Act regulating proceedings before the Commission, and the chapter describing sanctions delivered by the Commission.

There is a serious sub-standardization of the proceedings before the Commission, starting with a request for initiation of proceedings, followed by the approval or denial for request to start proceedings, to the adoption of an appropriate decision. The time limits set by the Act are disputable, since, as it has already happened in practice, they jeopardize thorough and complete assessment of complex cases. This is due to the fact that application of provisions of the General Administrative Procedure Act to issues not regulated by this Act proved to be inappropriate for proceedings before the Commission. Since issues regulated by the Act on the Protection of Competition often require special rules, it would be better to enact specific procedural rules that treat proceedings before the Commission as a separate form of administrative proceedings.

As for the character of decisions adopted by the Commission on administrative matters, a two-step principle is accepted. Decisions made

by the Commission are final, but against the final decision, an administrative law dispute may be initiated before the competent court, namely the Supreme Court of the Republic of Serbia. Although the nature of the administrative dispute is not clear, the Act implies complete jurisdiction (*de plain droit*) of the Supreme Court.[37] Regardless of the justifiability of this solution, there is a certain lack of feasibility, since the burden is put on the Supreme Court due to the fact that administrative courts have not yet started to work. Establishing administrative courts will however not entirely solve this problem, since they are about to face a new field, particularly when the court's assessment of the actual situation is required.

Another shortcoming of the Act relates to the lack of nullity of concentration and the lack of the power of the Commission to order de-concentration in the case a concentration is implemented without the Commission's approval. To certain market participants, it might be more acceptable to pay the fine, and still implement the transaction, if future monopoly returns are expected to outweigh the earlier loss due to the fine.

The imposition of monetary penalties and other measures are particularly burdened by the fact that the Commission itself is not entrusted with the power to impose monetary penalties, but can only submit a request to the relevant infringement authority for initiation of infringement procedure against concerned undertakings. The Act allows very high penalties, ranging from 1 to 10% of the total annual turnover for the previous financial year. These fines are in disproportion with the treatment of violations of competition law as minor violations, *i.e.* a misdemeanor, which are adjudicated by the Misdemeanor Courts. This kind of regulation creates two dilemmas. The first one regarding misdemeanor courts is one of the administrative systems under the patronage of administrative authorities. These courts have their own criteria for independent decision-making. The second dilemma questions the competence of Misdemeanor Courts, especially their audacity necessary to impose the maximum predicted fines to larger undertakings. Court that are more used to adjudicate traffic offenses may not live up to the

[37] *See* also Svetlicinii, *supra* note 37, at 254 (opposing the view expressed here).

challenge created by the amount of possible fines and the economic relevance of the proceedings in competition law matters.

An additional problem is that the Commission is not entrusted with the right to impose sanctions against market participants who refuse to cooperate during the inquiry. The Commission should be empowered with the ability to directly impose penalties for refusal of cooperation. Practical problems could occur related to enforcing imposed penalties due to the possibility of conducting two proceedings on the same matter at one time before different bodies. The decisions of the Commission determining and finding an infringement of the Act may be appealed to the Supreme Court. On the other hand, the Commission can initiate proceedings before a Misdemeanor Court. Consequently, the Supreme Court can repeal the decision, but a Misdemeanor Court can impose a penalty for the market participant (or vice versa). In addition different procedural rules can lead to different decisions, especially in the case of a violation of procedural rules.

Specific penalty provisions contradict the National Strategy of Serbia for Serbia and Montenegro's Accession to the European Union.[38] The Strategy requires the entire penalty procedure be entrusted to the Commission, including the imposition of fines for an infringement of the Act, and that judicial protection be provided in administrative court proceedings initiated by the allegedly infringer against the Commission. Such an approach would in fact ensure the simplicity of the procedure and would enable the Commission to react in time and to impose penalties in conformity with EC rules according to which the European Commission is empowered to impose fines.

Finally, among the issues not regulated by this Act is the imposition of sanctions in case of retaining relevant information or submitting incorrect or misleading data and information during the inquiry, as well as provisions on a leniency program.

The Act does not specify its relation to the increasing number of regulatory bodies empowered to regulate competition issues in special sectors of the economy, such as the energy, media, securities or banking

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[38] *See* National Strategy of Serbia for Serbia and Montenegro's Accession to the European Union, Serbian European Office, June 2005, at 72, available at <http://www.seio.sr.gov.yu/code/navigate.asp?Id=73> (as of January, 2008).

sector.[39] This limitation of the jurisdiction of the Commission for the Protection of Competition can undermine a coherent approach to protecting competition in Serbia.

Radovan Vukadinović, PhD[*]

Neka kritička zapažanja o Zakonu o zaštiti konkurencije Republike Srbije

U radu su prikazani sadržina i osnovna rešenja Zakona o zaštiti konkurencije Republike Srbije od 2005. godine. Kao osnovni oblici povrede konkurencije u Zakonu su navedeni i pravno regulisani kartelni sporazumi, zloupotreba dominantnog položaja i zabranjene koncentracije, a kao telo koje će se starati o povredma predviđeno je osnivanje Komisije za zaštitu konkurencije. Komisija za zaštitu konkurencije je zamišljena kao nezavisno i stručno telo, ali na osnovu početnog iskustva u radu Komisije autor izražava određenu sumnju u spremnost Vlade da za to zaista i obezbedi neophodne uslove. Određene kritičke primedbe su upućene i na druga rešenja: kako materijalnom pogledu, na primer u pogledu visinu tzv. praga kod prijave koncentracija, tako i u procesnih smislu, na primer, u vezi nedorečenosti rešenja kod regulisanja pojedinih pitanja u prethodnom i u glavnom postupku ispitivanja.

***Ključne reči**: z*aštita konkurencije, povreda konkurencije, restriktivni sporazumi, zloupotreba dominantnog položaja, Komiaija za zaštitiu konkurencije

Key words: protection of competition, violation of competition, restrictive agreements, abuse of dominant position, Commission for protection of competition.

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[39] For instance, the new Law on the National Bank of Serbia regulates competition in the banking sector under the authority of the National Bank of Serbia. *See* Law on the National Bank of Serbia, *Official Gazette of the Republic of Serbia*, No. 72/2003, available at <http://www.nbs.yu/export/internet/english/10/rlinks/law_nbs_200455.pdf> (as of January, 2008).

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ANTIMONOPOLSKA POLITIKA I HARMONIZACIJA ZAKONODAVSTVA SRBIJE SA PRAVOM EU NA POLJU KONKURENCIJE [2]

Apstrakt

Jedan od glavnih ciljeva Srbije je pristupanje članstvu Evropske unije, a uslov za to je potpuna harmonizacija zakonodavstva sa aquis communitaire. U ovom radu autori istražuju pitanja usaglašavanja domaćeg zakonodavstva sa propisima Evropske unije u periodu 2001-2010. godine i

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to na polju konkurencije. Autori će pokušati i da objasne u kom smeru se kretao razvoj pravnog okvira od Rimskog sporazuma do danas.

Pošto je do devedesetih godina celokupna privreda Srbije bila pod državnim, tj. društvenim monopolom, glavna smetnja usaglašavanja prava je i to što je položaj tržišta značajno promenjen. Zbog obimnosti teme fokus istraživanja će biti usmeren na antimonopolsku politiku u okviru prava konkurencije. Autori će dati osvrt na novodoneseni Zakon o zaštiti konkurencije iz 2009. godine. U procesu usaglašavanja domaćeg zakonodavstva sa propisima Evropske unije u periodu 2001-2010. godine, u Srbiji su formirana gotovo sva nezavisna regulatorna tela, uključujući i Komisiju za zaštitu konkurencije koja je formirana zakonom iz 2005. godine. Pre formiranja Komisije pitanjem zaštite konkurencije, u skladu sa Antimonopolskim zakonom koji je bio na snazi od 1996. do 2005. godine, bavilo se samo Odeljenje za antimonopolske poslove pri Ministarstvu trgovine, turizma i usluga, bez vidljivih rezultata na tom polju.

Ključne reči: Srbija, Evropska unija, zaštita konkurencije, antimonopolska politika, Komisija za zaštitu konkurencije.

1. KONKURENCIJA I NJENO NARUŠAVANJE

Konkurencija, kao ekonomski pojam, vodi poreklo iz klasične ekonomske teorije 18. veka. Adam Smit ju je u svom delu 'An inquiry into the nature and causes of the wealth of nations' opisao kao alokaciju produktivnih resursa na način da se oni najbolje iskoriste. Perfektna ili idealna konkurencija je obeležila period klasične liberalne ekonomije čiji je model počivao na postojanju velikog tržišta sa velikim brojem ekonomskih učesnika, postojanju homogenih proizvoda, potpunoj dostupnosti svih relevantnih informacija svim ekonomskim učesnicima da bi se maksimizovala korisnost od obavljanja transakcija, i potpuna mobilnost svih faktora proizvodnje. Samim tim, pravo konkurencije je bilo ograničeno na skup pravnih i drugih pravila ponašanja učesnika na tržištu koje donosi država, sa ciljem da se stvori pogodno pravno i institucionalno okruženje kao pretpostavka postojanja takvog modela. Krajem 19. i početkom 20. veka dolazi do velike koncentracije kapitala što je u promenjenim proizvodnim okolnostima dovelo do monopolizacije i smanjenog obima konkurencije na određenim segmentima tržišta kapitalističke privrede. Tada se pojavljuju i prve antimonopolske regulative (u vidu antitrustovskog Šermanovog zakona u Sjedinjenim Američkim Državama 1890). Iako u ekonomskoj teoriji postoje različita mišljenja o samoj prirodi procesa konkurencije (npr Hayek-ovo insistiranje na njenoj dinamičnoj aktivnosti umesto statičnom stanju ili Schumpeter-ova teza o kreativnom uništavanju) preovlađuje teza da konkurencija na slobodnom

tržištu pruža najšire mogućnosti za sve učesnike i pruža najefikasniju alokaciju resursa, a na taj način i poboljšava efikasnost upotrebe faktora proizvodnje.

U pravu EU je zabranjen svaki sporazum koji ima za cilj ili posledicu narušavanje konkurencije. Konkurencija je utakmica slobodnih i nezavisnih učesnika na tržištu ali Rimski sporazum ne definiše konkurenciju. Stav 1. člana 81, radi ilustracije, na nelimitativan način samo nabraja pojedine sporazume kojima se konkurencija narušava i koji su stoga uvek zabranjeni.[3] Pri tome treba imati u vidu da i sporazumi koji nisu nabrojani takođe mogu narušavati konkurenciju. Rimski sporazum na nelimitativan način nabraja pojedine sporazume koji su uvek zabranjeni pošto uvek narušavaju konkurenciju.[4] Kako konkurencija može biti narušena i u drugim slučajevima, potrebno je definisati pojam narušavanja.

Narušavanje konkurencije putem sporazuma postoji ako sporazum vodi do ograničavanja slobode u odnosima između strana («unutrašnja konkurencija» ili "*intra brand* konkurencija"), ili ako vodi do ograničavanja slobode između, s jedne strane, lica u sporazumu i, s druge strane, trećih lica ("spoljna konkurencija" ili "*inter brand*" konkurencija). Narušavanje se može sastojati u potpunom sprečavanju (isključivanju), ograničavanju (umanjivanje slobode u donošenju pojedinih odluka) ili izigravanju konkurencije (utvrđivanje tržišnih uslova koji ne bi mogli postojati u slučaju slobodne tržišne utakmice). Ova tri pojma obuhvataju sve moguće načine narušavanja konkurencije.[5]

2. DRŽAVNA POMOĆ PREDUZEĆIMA

Regulisanje državne pomoći koju zemlje članice pružaju preduzećima ili određenim privrednim granama zauzima jedno od ključnih mesta u pravu konkurencije EU. Pitanje državne pomoći je od posebnog značaja i za

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[3] To su sporazumi kojima se (1) utvrđuju cene ili drugi uslovi transakcije, (2) ograničava ili kontroliše proizvodnja, isporuke, tehnički razvoj ili ulaganja, (3) dele tržišta ili izvori nabavke ili (4) uslovljava sklapanje sporazuma uslugama koje nisu vezane sa predmetom sporazuma.

[4] To su sporazumi kojima se (1) utvrđuju cene ili drugi uslovi transakcije, (2) ograničava ili kontroliše proizvodnja, isporuke, tehnički razvoj ili ulaganja, (3) dele tržišta ili izvori nabavke ili (4) uslovljava sklapanje sporazuma uslugama koje nisu vezane sa predmetom sporazuma.

[5] T. Rajčević, Pravo konkurencije Evropske Unije – osnovne postavke, Kancelarija za pridruživanje EU, Beograd, str. 16-9.

sprovođenje politike konkurencije koje je u nadležnosti Komisije EU, Saveta i Evropskog suda pravde.

U Rimskom ugovoru o osnivanju EEZ prihvaćeno je shvatanje radne konkurencije na čijem poštovanju je stvarano zajedničko tržište i ekonomsko ujedinjenje država članica. Sa tog stanovišta, državni intervencionizam je definisan kao suprotan slobodnoj trgovini među članicama EZ, odnosno kao oblik narušavanja konkurencije na tržištu EZ. Polazeći od toga da državna intervencija narušava i meša se u tržišnu privredu, pojam državne pomoći u sebi obuhvata iskrivljavanja konkurencije i stvaranje nelojalne prednosti za domaće proizvođače ili izvoznike.

Materijalno-pravni sistem uspostavljen ugovorom o osnivanju EEZ-e zajedničko (odnosno od Jedinstvenog evropskog akta iz 1986. " unutrašnje") tržište i zajedničke politike.

Opšta zabrana državne pomoći zasniva se na osnovu člana 92. stav 1. Ugovora, koji glasi: "Ako ovim Ugovorom nije drugačije određeno, smatraće se da su nespojive sa zajedničkim tržištem u meri u kojoj ugrožavaju trgovinu između država članica, svi oblici državnih ili iz državnih sredstava odobrenih subvencija, koji putem povlašćivanja određenih preduzeća ili proizvodnih grana prete da dovedu ili dovode do nedozvoljene nelojalne konkurencije."[6] Ovde utvrđivanje nespojivosti sa zajedničkim tržištem ima kvalitet zabrane, iako norma to izričito ne navodi (normativni koncept). Takvo tumačenje je potvrdio Evropski Sud Pravde u slučajevima, kao što je Komisija protiv Francuske iz 1969. i slično.[7] Predmet zabrane su jednostrani državni akti članica EU, kojima one, radi sopstvenih ekonomskih i socijalnih ciljeva, pružaju određenim preduzećima ili sektorima pomoć različitih vidova. Ova pomoć je pod udarom zabrane samo ako se njome ugrožava trgovina među članicama EU i ako se njome može narušiti ili se narušava konkurencija na jedinstvenom tržištu EU.

Da bi pomoć koju država članica pruža nekom preduzeću pala pod udar zabrane iz člana 92. stav 1. Ugovora neophodno je da budu ispunjena dva uslova. S jedne strane, neophodno je da se pružanjem te pomoći narušava konkurencija ili čini pretnja takvog narušavanja i to kroz favorizovanje određenih preduzeća. Dakle, autori Ugovora su nastojali da zaštite ono što

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[6] R. Vukadinović, *Evropska ekonomska zajednica*, Beograd 1991, str. 184.

[7] Za pregled svih slučajeva pogledati internat adresu http://europa.eu/scadplus/scad_en.htm, 21.04.2008.

Komisija naziva "principi ekonomske pravičnosti",[8] što podrazumeva uključivanje privrednih subjekata u tržišnu utakmicu vlastitim sredstvima. S druge strane, pomoć država članica preduzećima koji ispunjavaju prvi navedeni uslov treba da bude takva da utiče na promet između država članica i tek u tom slučaju i u meri u kojoj proizvodi takav efekat ona podleže pod udar navedene zabrane. Dakle, ukoliko nema prekograničnog efekta date pomoći, tj. ako ona ima uticaj samo na unutrašnje stanje na tržištu neke države članice takva pomoć nije zabranjena Ugovorom, već, eventualno, može pasti pod udar nacionalnih propisa o konkurenciji države članice u pitanju. Prema ovome, treba imati u vidu da se traži prekograničnost efekata date pomoći, a ne samog akta koji taj efekat proizvodi. Usled razvoja trgovine u Zajednici i ekonomske isprepletenosti i povezanosti u njenim okvirima retki su slučajevi pomoći čiji efekat ima samo interni karakter.

Direktiva Komisije 80-723 od 25. juna 1980. godine o transparentnosti finansijskih odnosa između država članica i javnih preduzeća sadrži listu mogućih oblika državnih pomoći preduzećima. Te pomoći se mogu svrstati u tri grupe.[9] Prvu i najčešću grupu čine finansijska davanja preduzećima, među kojima posebno značajno mesto imaju državne subvencije, ali su mogući i poznati i drugi oblici pomoći iz ove grupe (npr. davanje zajmova pod uslovima povoljnijim od tržišnih). Drugu grupu ovih pomoći čine poreska oslobađanja i olakšice ili oslobađanja i olakšice na druge državne namete. Treću grupu državne pomoći preduzećima čine određene vrste garancija kao npr. garancija za povraćaj zajmova, garancija isplate dividende privatnim ulagačima itd.

Izuzeci od zabrane državne pomoći preduzećima su pomoći koje se automatski (*ex lege*) smatraju dozvoljenim i pomoći koje može odobriti Komisija ili, izuzetno, Savet Ministara.

Da bi se osigurala efikasna primena, a time i delovanje sistema kontrole državne pomoći, neophodni su prihvatljivi propisi koji se odnose na proceduru. Ovi propisi se odnose i na ovlašćenja organa zaduženih za primenu tih propisa, kao i na prava preduzeća u pitanju. Nacionalna zakonodavstva moraju dozvoliti mogućnost sudske revizije preduzećima na koje odluke Komisije imaju direktan uticaj.

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[8] Deveti izveštaj Komisije o politici konkurencije iz 1979. godine, str. 10.

[9] Internet adresa: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1980L0723:20051219:EN:PDF, 21.04.2008.

Polazeći od značaja očuvanja nenarušenih odnosa konkurencije u okviru zajednice koju je stvarao Ugovor o osnivanju Evropske zajednice za ugalj i čelik, inače u celini mnogo strožiji i čvršći od Ugovora o osnivanju EEZ je predvideo strogu zabranu subvencije i pomoći odobrenih od države i specijalnih opterećenja koje one nametnu u kojoj god to bilo formi.[10] Ugovor o osnivanju EEZ je sa svoje strane postavljajući napred opisanu zabranu predvideo i neke izuzetne situacije i slučajeve u kojima je moguće odstupiti od te zabrane tj. u kojima se pružanje državne pomoći preduzećima koja ispunjavaju napred navedene uslove, ipak ne smatra suprotnim zajedničkom tržištu i zabranjenim, već se naprotiv, tretira kao legalno. Takve dozvoljene državne pomoći preduzećima se mogu svrstati u dve grupe: pomoći koje se automatski smatraju dozvoljenim i pomoći koje može odobriti Komisija ili, izuzetno, Savet Ministara.

Odredba čl. 92. stav 2 Ugovora je predvidela tri grupe pomoći država preduzećima koje se *ex lege* smatraju dozvoljenim, ali je promena istorijskih okolnosti treću grupu učinila bespredmetnom, pa se njihov broj sveo na dve.

Prva grupa ima socijalni karakter i, iako se dodeljuje preduzećima, njeni stvarni i konačni korisnici su pojedinačni potrošači. Uslov za legalnost ovih pomoći je da budu dodeljene bez diskriminacije zasnovane na poreklu robe. Kao jedan od karakterističnijih primera ovakvih pomoći često se navodi pomoć koja omogućava snižavanje cena životnih namirnica za građane sa niskim primanjima.

Drugi dozvoljeni vid državne pomoći preduzećima je izuzetne prirode. Radi se o pomoći koja ima za cilj otklanjanje šteta nastalih usled prirodnih nepogoda ili drugih izuzetnih događaja.

Treća vrsta državnih pomoći preduzećima koje se prema odredbi čl. 92. stav 2 smatraju automatski dozvoljenim su one koje su bile dodeljivane privredama nekih regiona SR Nemačke pogođenih podelom Nemačke, u meri u kojoj su potrebne da bi se nadoknadile ekonomske posledice prouzrokovane podelom. Počev od 3. oktobra 1990. godine kada je došlo do ujedinjenja Nemačke, ova odredba je izgubila smisao.

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[10] Presuda od 22.3.1977. godine u predmetu *Steinnccke*, br. 78/ 76 zbog čega ga kvalifikuju kao ugovor zakon, za razliku ugovora o osnovanju EEZ, koga kvalifikuju kao ugovor okvir.

3. MONOPOLI I KARTELI

Članovi 85. i 86. Rimskog ugovora su osnov za antikartelsko i antimonopolsko zakonodavstvo Evropske unije[11] Oni se primenjuju kako na određene horizontalne, tako i na određene vertikalne aranžmane između kompanija, u skladu sa detaljnim direktivama Komisije. Član 85. predviđa opštu zabranu dogovora ili sporazuma kojima se sprečava ili ograničava konkurencija u trgovini između zemalja članica, a članom 86. se propisuje zabrana zloupotrebe dominantnog položaja preduzeća na tržištu.

4. SPORAZUMEVANJE PREDUZEĆA KOJIM SE NARUŠAVA KONKURENCIJA

Član 85. Rimskog ugovora je kao apsolutno ništavim okarakterisao "sve ugovore između preduzeća, odluke o udruživanju preduzeća i usklađena praktična ponašanja preduzeća na tržištu, koji mogu da utiču na trgovinu između država članica i koji imaju za cilj ili za rezultat da spreče, ograniče ili izvitopere odvijanje konkurencije na zajedničkom tržištu".[12] U članu 85. su nabrojana četiri uslova u kojima se inače antikonkurentno ponašanje toleriše. Njihovim simultanim ispunjenjem se smatra da je načinjena antikonkurentna šteta manja od ukupne ekonomske koristi. Uslovi su: ugovor mora doneti ekonomski progres; deo koristi mora biti ustupljen potrošačima; da postoji konkurencija u pogledu značajnog dela roba ili usluga u pitanju; da je dozvoljeno samo ono ograničenje konkurencije koje je neophodno za postizanje pomenutog ekonomskog progresa. Ovo izuzeće može se dobiti bilo na pojedinačnoj bilo na grupnoj osnovi, s tim da se da se ugovor mora prethodno prijaviti Komisiji. Postoji i grupa ugovora čija notifikacija nije potrebna, jer je dobijanje izuzeća od delovanja člana 85. automatsko. To su sledeći ugovori: ugovori o specijalizaciji, ekskluzivni distributivni aranžmani, ekskluzivni aranžmani o kupovini, aranžmani licenciranja patenta, istraživački i razvojni dogovori, distributivni aranžmani u automobilskom sektoru, franšize i *know-how*.

S obzirom na činjenicu što je član 85. Rimskog ugovora direktno primenjiv u državama članicama, odgovarajući organi država članica su ovlašćeni da

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[11] Pogledati napomenu 3. R. Vukadinović, *op. cit.*, str. 184.

[12] *Ibid*.

primenjuju navedenu zabranu sve dok pred Komisijom nije pokrenuta odgovarajuća procedura.

5. ZLOUPOTREBA DOMINANTNOG POLOŽAJA

Član 86. Rimskog ugovora predviđa da je nekompatibilna sa zajedničkim tržištem i zabranjena zloupotreba dominantnog položaja jednog ili grupe preduzeća na zajedničkom tržištu ili njegovom značajnom delu, u meri u kojoj može da utiče na trgovinu među državama članicama.[13] Kao i prethodni član, i ovaj je direktno primenjiv u državama članicama. Od ovoga pravila ne postoje izuzeci.

Pojam dominantne pozicije nije definisan u Ugovoru, ali je njega razradila, pre svega, sudska praksa Suda pravde. Sudska praksa je takođe razradila i pojam zloupotrebe dominantnog položaja, kvalifikujući ga kao ponašanje "takve prirode da utiče na strukturu jednog tržišta, na kome je upravo zbog prisustva preduzeća sa dominantnim položajem nivo konkurencije već oslabljen i koji ima efekat da ometa održavanje postojećeg nivoa ili razvoj konkurencije".[14]

Član 82. Ugovora EZ, propisuje: "Nije u skladu sa zajedničkim tržištem i zabranjena je svaka zloupotreba u korišćenju dominantnog položaja na zajedničkom tržištu, ili na njegovom bitnom delu, od strane jednog ili više preduzeća, ukoliko bi to moglo štetno uticati na trgovinu između država članica. Takve zloupotrebe se sastoje naročito u: a) neposrednom ili posrednom nametanju neodgovarajuće kupovne ili prodajne cene ili ostalih uslova razmene; b) ograničavanju proizvodnje, plasmana ili tehničkog razvoja na štetu potrošača; c) primenjivanju nejednakih uslova na iste poslove sa različitim partnerima, stavljajući ih na taj način u lošiji konkurentski položaj; i d) uslovljavanju zaključenja ugovora prihvatanjem dodatnih obaveza koje po svojoj prirodi ili prema trgovačkim običajima nisu u vezi sa predmetom ugovora."[15] Kao što se vidi iz citiranog čl. 82, nije zabranjen dominantan položaj kao takav, za razliku od normi prava SAD koje

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[13] Pogledati napomenu 3. R. Vukadinović, *op. cit*., str. 184.

[14] Presuda od 13. februara 1979. godine u predmetu 85/76 *Hoffman-Laroche*.

[15] D. Lopandić, *Osnivački ugovori Evropske Unije*, Beograd 2003, str. 52.

inkriminišu svaki monopol i akte učinjene u cilju stvaranja istog (*Sherman Act* čl. 2), već je zabranjena samo njegova zloupotreba.[16]

6. KONTROLA SPAJANJA PREDUZEĆA

Izuzetan porast broja spajanja preduzeća u celom svetu, a naročito onih koja su vezana za preduzeća iz Evropske unije ili za priliv direktnih stranih investicija po ovom osnovu prinudio je EU da svoju regulativu politike konkurencije proširi. Rimski ugovor ne govori direktno o ovom problemu zato se Savet ministara 21. decembra 1989. godine usvojio Direktivu br 4084/89.[17] Ovom Direktivnom je predviđena obaveza i procedura sticanja prethodne dozvole koju dodeljuje Komisija za realizaciju velikih operacija spajanja, predviđajući kriterijume po kojima se određuje iznad koje veličine preduzeća koja učestvuju u operaciji spajanja postoji obaveza prethodnog dobijanja dozvole. Za sprovođenje politike kontrole spajanja preduzeća odgovorna je Komisija. Direktiva predviđa ogovarajući rok u kome se operacija spajanja mora najaviti Komisiji, a ova, opet u određenom roku može ili oglasiti operaciju spajanja dozvoljenom ili pokrenuti odgovarajuću proceduru.[18]

Samo u godini nakon donošenja pomenute Direktive (1990. godine) bilo je oko 1400 slučajeva spajanja kompanija na nacionalnom, internacionalnom i na nivou Unije, pribavljanja manjinskog učešća i zajedničkih ulaganja. Daleko najveći broj takvih slučajeva dogodio se u industriji (oko 70%), zatim u području bankarstva (oko 17%), dok se ostatak odnosio na osiguranje i distribuciju.

7. MIŠLJENJE EU O KONKURENCIJI U SRBIJI

Prema izveštaju Evropske Komisije o napretku Srbije u približavanju Evropskoj Uniji za 2010. godinu, zabeležen je određeni napredak u oblasti borbe protiv monopola. Usvojeni su i podzakonski propisi u skladu sa Zakonom o zaštiti konkurencije, kojima se posebno obuhvata definicija

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[16] Pogledati internet stranu http://www.stolaf.edu/people/becker/antitrust/statutes/sherman.html, 21.04.2008.

[17] Merger-Control Regulation, *Official Journal of the European Communities* No L 395, od 30. decembra 1989. godine.

[18] Pogledati internet stranicu http://ec.europa.eu/comm/competition/index_en.html, 21.05.2008.

tržišta, obaveštenje o spajanju kompanija uz pripajanje, pojedinačne i grupne olakšice u vezi sa restriktivnim kaznama po osnovu ugovora i programa olakšica. Komisija za zaštitu konkurencije je nastavila sa svojim aktivnostima i usvojila odluke o spajanju kompanija uz pripajanje i zloupotrebi dominantnog položaja a takođe i smernice u vezi sa podzakonskim propisima. Službe Komisije za zaštitu konkurencije su reorganizovane, posebno uspostavljanjem zasebnih odeljenja za ekonomsku analizu i pravne poslove, a njeni kapaciteti za sprovođenje ekonomske analize su ojačani. Potpisan je određeni broj sporazuma o saradnji sa posebnim organima koji su nadležni za određene sektore, kao i sa organima nekih država članica EU i susednih država koji su nadležni za konkurenciju. Narodna skupština Republike Srbije je u oktobru 2010. godine imenovala predsednika i članove Saveta Komisije za zaštitu konkurencije.[19]

Međutim, Zakon o zaštiti konkurencije je doveden u pitanje usvajanjem nekih horizontalnih zakona koji su u sukobu sa njim, pre svega usvajanjem Zakona o obaveznom osiguranju u saobraćaju. Komisija za zaštitu konkurencije mora i da unapredi svoju stručnost i znanje u proceduralnim pitanjima. Kapaciteti pravosuđa u rešavanju krupnih slučajeva konkurencije su i dalje slabi i neophodno je rešiti i taj problem da bi došlo do efikasnije primene zakona. U oblasti državne pomoći ostvaren je napredak. Komisija za kontrolu državne pomoći je osnovana u decembru 2009. godine, i počela je da deluje u aprilu 2010. godine. Stalno odeljenje za kontrolu državne pomoći, kao nezavisno odeljenje u okviru Ministarstva finansija, pomaže Komisiji u njenom radu. U julu 2010. godine, Komisija je usvojila Inventar državne pomoći za 2009. godinu. Međutim, administrativni kapaciteti Odeljenja za državnu pomoć su i dalje nedovoljni pa su potrebni dalji napori kako bi se uspostavilo vođenje evidencije o primeni odluka o državnoj pomoći.

Prema mišljenju Evropske Komisije, Srbija je umereno napredovala u ispunjavanju zahteva Privremenog sporazuma u oblasti konkurencije. Međutim, nedostaci još uvek postoje te treba nastaviti sa jačanjem kapaciteta i stručnosti Komisije za zaštitu konkurencije i pravosudnih organa.

8. ZAŠTITA KONKURENCIJE U SRBIJI

Nakon usvajanja Zakona o zaštiti konkurencije u septembru 2005. godine, Srbija je osnovala nezavisno telo za zaštitu konkurencije . Komisiju za zaštitu

[19] Prema Izveštaju o napretku Srbije za 2010. godinu Evropske Komisije

konkurencije, koja se sastoji od Saveta, kao organa za donošenje odluka, i administrativne službe. Komisija je počela sa radom u maju 2006. godine, neposredno nakon usvajanja pravilnika. Pomoćno osoblje, sa određenim iskustvom u primeni pravila za zaštitu konkurencije, preuzeto je iz Antimonopolske komisije u okviru Ministarstva trgovine, turizma i usluga, što je Komisiji omogućilo da počne sa radom bez većeg zastoja.

U oblasti kontrole državne pomoći, Srbija je učinila znatan napredak određivanjem posebne jedinice u okviru Ministarstva finansija koja će se baviti praćenjem i prijavljivanjem državne pomoći. Srbija je u maju 2006. godine usvojila popis državne pomoći za 2003. i 2004. godinu. Trenutno ne postoji pravni okvir za kontrolu državne pomoći. Naša država mora da ojača svoje strukture za državnu pomoć i da uspostavi sistem *ex-ante* kontrole novih mera pomoći i usklađivanje postojećih mera, kroz operativno nezavisno državno telo u oblasti kontrole državne pomoći, koje će biti ovlašćeno da odobri ili da zabrani sve mere i da naredi povraćaj bespravno odobrene pomoći.

Sredinom 2009. godine Narodna skupština Srbije je usvojila novi Zakon o zaštiti konkurencije koji je uglavnom usaglašen sa antimonopolskim odredbama Ugovora i odgovarajućim direktivama EU. Najznačajnije unapređenje u odnosu na raniji zakon iz 2005. godine ogleda se u bitno povećanim nadležnostima Komisije. Međutim, izostale su neke odredbe, koje bi olakšale rad Komisije i njene odluke učinile manje arbitrarnim i pouzdanijim, među kojima je od posebnog značaja kriterijum za utvrđivanje tzv. relevantnog tržišta.

Zakonom o zaštiti konkurencije iz 2009. godine uređuje se zaštita konkurencije na tržištu Republike Srbije, u cilju ekonomskog napretka i dobrobiti društva, a naročito koristi potrošača, kao i osnivanje, položaj, organizacija i ovlašćenja Komisije za zaštitu konkurencije. Bez efikasne primene propisa u oblasti zaštite konkurencije Srbija neće moći da uđe u Evropsku uniju.

Ostvaren je napredak u oblasti državne pomoći. Komisija za kontrolu državne pomoći je osnovana u decembru 2009. godine, kao što je predviđeno SPP, i počela je da deluje u aprilu 2010. godine. Stalno odeljenje za kontrolu državne pomoći, kao nezavisno odeljenje u okviru Ministarstva finansija, pomaže Komisiji u njenom radu. U julu 2010. godine, Komisija za kontrolu državne pomoći usvojila je Inventar državne pomoći za 2009. godinu. Međutim, naša zemlja treba da ulaže dalje napore kako bi uspostavila vođenje evidencije o primeni odluka o državnoj pomoći.

U oblasti javnih nabavki nije zabeležen značajniji razvoj. Zakonodavstvo u oblasti javnih nabavki je velikim delom zasnovano na pravnoj tekovini EU. Međutim, primena konzistentnog, nediskriminatornog i efikasnog sistema javnih nabavki zaustavljena je dok se ne usvoji novi Zakon o javnim nabavkama. Potrebno je uložiti dodatne napore kako bi se ojačali kapaciteti za primenu zakona u okviru Uprave za javne nabavke i Komisije za zaštitu prava, tako što će se povećati njihova nezavisnost u odnosu na vladu i obezbediti transparentnost u odlučivanju. Počela je priprema za usklađivanje sa pravnom tekovinom EU i u ovoj oblasti. Uopšteno gledano, pripreme u Srbiji su znatno uznapredovale u oblasti javnih nabavki.[20]

Još uvek postoje monopolističke strukture koje kontroliše država. Preko svojih pravnih i finansijskih mehanizama, država i dalje vrši veliki uticaj na konkurentnost. Zabeležen je određeni napredak u oblasti borbe protiv monopola.

Usvojeni su podzakonski propisi u skladu sa Zakonom o zaštiti konkurencije, kojim Srbija nastavlja usaglašavanje sa zahtevima Prelaznog sporazuma (PS). Ovim se posebno obuhvata definicija tržišta, obaveštenje o spajanju kompanija uz pripajanje, pojedinačne i grupne olakšice u vezi sa restriktivnim kaznama po osnovu ugovora i programa olakšica. Komisija za zaštitu konkurencije (KZK) je nastavila sa svojim aktivnostima i usvojila odluke o spajanju kompanija uz pripajanje i zloupotrebi dominantnog položaja, dalje unapređujući svoje vođenje evidencije. Komisija je takođe usvojila smernice u vezi sa podzakonskim propisima. Službe Komisije za zaštitu konkurencije su reorganizovane, posebno uspostavljanjem zasebnih odeljenja za ekonomsku analizu i pravne poslove. Potpisan je veliki broj sporazuma o saradnji sa posebnim organima koji su nadležni za određene sektore, kao i sa organima nekih država članica EU i susednih država koji su nadležni za konkurenciju. Narodna skupština Republike Srbije je u oktobru 2010. godine imenovala predsednika i članove Saveta Komisije za zaštitu konkurencije.

Međutim, Zakon o zaštiti konkurencije je doveden u pitanje usvajanjem nekih horizontalnih zakona koji su u sukobu sa njim, naime usvajanjem Zakona o obaveznom osiguranju u saobraćaju. Vlada još uvek nije usvojila finansijski

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[20] Komisija Evropskih zajednica, Brisel, 08.11.2006., SEC (2006)1389, Radni dokument Komisije, Izveštaj o napretku Republike Srbije u 2006. god., {COM (2006) 649 konačna verzija}, str. 28-29.

plan KZK za 2010. godinu. I dalje treba jačati kapacitete KZK za sprovođenje ekonomske analize i rešavanje proceduralnih pitanja radi potpunog poštovanja zahteva PS. Takođe, KZK mora da unapredi svoju stručnost i znanje u proceduralnim pitanjima. Kapaciteti pravosuđa u rešavanju krupnih slučajeva konkurencije i dalje su slabi i neophodno je uložiti značajne napore po tom pitanju. Ostaje da se vidi efikasnija primena zakona.

Uopšteno govoreći, Srbija je umereno napredovala u ispunjavanju zahteva Privremenog sporazuma u oblasti konkurencije. Međutim, i dalje treba jačati kapacitete i stručnost Komisije za zaštitu konkurencije i pravosudnih organa.[21].

Odredbe Zakona o zaštiti konkurencije od 1. novembra 2009. godine primenjuju se na sva pravna i fizička lica koja neposredno ili posredno, stalno, povremeno ili jednokratno učestvuju u prometu robe, odnosno usluga, nezavisno od njihovog pravnog statusa, oblika svojine ili državljanstva, odnosno državne pripadnosti, i to na:

1) domaća i strana privredna društva i preduzetnike;
2) državne organe, organe teritorijalne autonomije i lokalne samouprave;
3) druga fizička i pravna lica i oblike udruživanja učesnika na tržištu (sindikati, udruženja, sportske organizacije, ustanove, zadruge, nosioci prava intelektualne svojine i dr.);
4) javna preduzeća, privredna društva, preduzetnike i druge učesnike na tržištu, koji obavljaju delatnosti od opšteg interesa, odnosno kojima je aktom nadležnog državnog organa dodeljen fiskalni monopol, osim ukoliko bi primena ovog zakona sprečila obavljanje tih delatnosti, odnosno obavljanje poverenih poslova.[22]

Novi zakon omogućava Komisiji da, osim kazni, izriče i mere kojima će uticati na uspostavljanje konkurencije na srpskom tržištu. Komisija do sada nije imala mehanizme da pribavi dokaze o postojanju nelojalne konkurencije, ali novi zakon omogućava predstavnicima Komisije da uđu u poslovne i privatne prostorije da bi pronašli dokaze. Tako da će moći da se kazne slučajevi kada jedan učesnik ima dominantan položaj na tržištu, sklapanje

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[21] Evropska Komisija izveštaj o napretku Srbije za 2010. godinu, Brisel, str. 31.

[22] http://www.siepa.gov.rs/site/sr/home/1/zakoni/zastita_konkurencije/

sporazuma kojima se ograničava konkurencija, kao i koncentracija učesnika na tržištu. Efikasno sprovođenje Zakona o zaštiti konkurencije omogućava ekonomski razvoj države.

Nakon napretka 2006. i 2007, tokom protekle dve godine politika zaštite konkurencije u Srbiji stagnira. Među 133 zemlje obuhvaćene metodologijom Svetskog ekonomskog foruma u Davosu, po efektivnosti antimonopolske politike nalazimo se na 130, a po nivou tržišne dominacije na 131. mestu.

U procesu usaglašavanja domaćeg zakonodavstva sa propisima Evropske unije u periodu 2001-2009. godine, u Srbiji su formirana gotovo sva nezavisna regulatorna tela, uključujući i Komisiju za zaštitu konkurencije koja je formirana zakonom iz 2005. godine. Pre formiranja Komisije pitanjem zaštite konkurencije, u skladu sa Antimonopolskim zakonom koji je bio na snazi od 1996. do 2005. godine, bavilo se samo Odeljenje za antimonopolske poslove pri Ministarstvu trgovine, turizma i usluga, bez vidnijih rezultata na tom polju.

Zbog nedovoljnih ovlašćenja, nedovoljnih stručnih kapaciteta i nedostatka političke volje, Komisija je imala veoma mali uticaj na sprečavanje monopolskog ponašanja. Tako, na primer, nijedno rešenje o zloupotrebi monopolskog položaja nije sprovedeno, odnosno nije ga potvrdio Vrhovni sud, uključujući i preuzimanje najvećeg trgovinskog lanca u Beogradu krajem 2005. godine i ispitivanje monopola u mlekarskoj industriji. Komisija se inače veoma malo bavila takvim krupnim pitanjima jer je zbog ranijih zakonskih rešenja (nizak vrednosni prag za obavezu prijave koncentracije) najviše svojih kapaciteta upotrebila za davanje mišljenja o (ne)dozvoljenim koncentracijama često minornog obima, sa malom verovatnoćom da će prouzrokovati povredu konkurencije ukoliko se dogode.

Četiri godine posle formiranja Komisije, prema ocenama Evropske banke za obnovu i razvoj i Svetskog ekonomskog foruma, Srbija se prema indeksu tržišne dominacije i efektivnosti antimonopolske politike našla na začelju među zemljama iz okruženja. Na takvu ocenu i razloge za takav položaj upućuje i poslednji izveštaj Komisije: „Republika Srbija daleko zaostaje u ovim domenima za državama članicama Evropske unije, ali i za pojedinim državama u tranziciji. Svesna svoje uloge na promociji politike konkurencije, Komisija je u protekloj godini Vladi Republike Srbije i resornim ministarstvima redovno upućivala mišljenja o propisima koji neopravdano ograničavaju konkurenciju, ali u većini slučajeva bez efekta.

Stručnjaci očekuju da bi povećanje diskrecione moći Komisije za zaštitu konkurencije moglo dati rezultate u narednim godinama.

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Sanja Jelisavac Trošić M. Sc.

Harmonization of Legislation of the Republic of Serbia with the EU Legislation in the Field of Competition Antimonopoly Politics

Summary

One of the main goals of Serbia is accession to EU membership, and one of the conditions is harmonization with the acquis communitaire. In this paper, the authors will try to explain in which direction the field of competition has been moving, since the Treaty of Rome to present day.

Since the nineties the entire economy of Serbia was under state monopoly, the main obstacle to legal harmonization is the fact that the market position significantly changed. Because of the scope of the topic, the research will focus on antimonopoly policy within the competition law. The authors will give an overview of the newly adopted 2009. Law on Protection of Competition. In the process of harmonizing national legislation with the European Union in the period 2001-2010., in Serbia were formed almost all independent regulatory body, including the Competition Commission which was established by law in 2005. Before the establishment of the Commission the issue of protection of competition under the antitrust law was in force since 1996. to 2005. and it was handeled only by Department for antitrust activities of the Ministry of Trade, Tourism and Services, with no visible results in the field.

***Key words**: Serbia, European Union, protection of competition, antimonopoly policy. Commission for protection of competition.*